Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2013

Leadership is a behavior, not a position

CASE LAW UPDATES
SECOND QUARTER

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Commissioner

Department of
CRIMINAL JUSTICE TRAINING
KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

DOCJT.KY.GOV

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 507 - MURDER

Kristoff v. Com., 2013 WL 2297125 (Ky. 2013)

FACTS: On January 13, 2010, Kristoff had just returned to Christian County on leave from the Army. He picked up his vehicle from his girlfriend's father, who had been storing it; he drank alcohol while there. It was dark when he left. "As he went through a sharp curve in the road, he crossed at least two feet over the double-yellow no-passing line and struck" a vehicle driven by Norma Cook. She was killed in the crash and her husband, the passenger, was injured.

The crash data recorder indicated Kristoff was doing 89 mph 2 seconds prior to the crash, and 86 mph one-tenth of a second before it. He did not apply the brakes. Norma's vehicle was going 43 mph. The upper limit on the road was 55 but the advisory speed in the curve was 40. Kristoff had two blood alcohol tests. The first, at the scene, presumably a PBT, indicated 0.1, the second, at the hospital, was 0.126.

Kristoff was indicted initially for Manslaughter 2nd. A second grand jury indicted him for Wanton Murder, Wanton Endangerment 1st, aggravated DUI, speeding and other traffic offenses. He was convicted and appealed.

ISSUE: May a collision that occurs as a result of driving in an extremely hazardous manner be considered Wanton Murder?

HOLDING: Yes

DISCUSSION: Kristoff argued that the Commonwealth did not prove all of the elements for KRS 507.020(1)(b) and that the circumstances of the accident did not rise to the level of "extreme indifference to human life." Under Brown v. Com., the Court had ruled that the "characteristics of wanton murder, as opposed to second-degree manslaughter, are (1) homicidal risk that is exceptionally high; (2) circumstances known to the actor that clearly show awareness of the magnitude of the risk; and "minimal or non-existent social utility in the conduct."[1] The Court, however, stated that these are not a checklist but simply factors a trial court could consider.

In Kristoff's case, the Court noted that it had previously made it clear that intoxication, along with other factors, can suffice to prove wanton murder.[2] His conduct, made the risk of a fatal accident extremely high. Kristoff's argument that he'd been taught to drive in the center of the road while in the Army to avoid road-side explosives, but the Court noted that any social utility for driving that way in the Army "disappeared when he

[1] 975 S.W.2d 922 (Ky. 1998).
[2] See Hamilton v. Com., 560 S.W.2d 539 (Ky. 1977).

returned to Christian County, Kentucky." Further, "the danger of roadside bombs approaches zero in the United States, but the danger of an oncoming car is extremely high."

Kristoff's conviction was affirmed.

PENAL CODE – KRS 508 – ASSAULT

Magyar v. Com., 2013 WL 2257694 (Ky. App. 2013)

FACTS: On the day in question. Officers Gipson and Durbin, Henderson County, r esponded to a domestic dispute at the home of Magyar and his girlfriend, Adams. She told the officers that Magyar had taken her cell phone and locked her out. Magyar admitted the officers. He denied having the cell phone but it was found in a brief search to be on the couch. As they left, Officer Gipson made a comment that angered Magyar, who then slammed the door on Gipson's hand, causing an injury.

Magyar was charged and convicted for Assault 3rd. He appealed.

ISSUE: May a door cause serious physical injury?

HOLDING: Yes

DISCUSSION: The Court looked to KRS 508.025(1)(a)(1), which provides that the offense of Assault 3rd may be committed recklessly, if a deadly weapon or dangerous instrument is involved. The Court agreed that the action, slamming the door, was reckless behavior, even if he didn't perceive the risk, and that the "heavy entrance door was forcefully slammed on Officer Gipson's hand." Although a door isn't usually considered a dangerous instrument, it was reasonable for a jury to find that it was capable of causing serious physical injury.

Magyar's conviction was affirmed.

PENAL CODE – KRS 510 – SEXUAL ABUSE

Stinson v. Com., 396 S.W. 3d 900 (Ky. 2013)

FACTS: During the summer of 2009, 17-year-old Betty[3] began living with Stinson, her uncle by marriage, in Madison County. Stinson subjected her to "sexual contact." When her parents learned of it, Stinson was indicted for Sexual Abuse 1st. He argued that the law of the "lack of consent" was an element of the offense, and that it was vague and overbroad. He admitted to the sexual contact but argued that it was consensual. His motion was denied and he took a conditional guilty plea, he then

[3] A pseudonym.

appealed. The Court of Appeals ruled that "lack of consent" was not an element of the crime. He further appealed.

ISSUE: May a minor not yet 18 give legal consent to sexual contact with a person in the "special trust" category?

HOLDING: No

DISCUSSION: First, the Court ruled that lack of consent can be shown that incapacity to consent can be shown from "any [other] circumstances' in which a victim does not expressly or impliedly consent." Further, in 2008, a new category of "position of special trust" was created; it applies when the victim is under 18, not 16. Under KRS 532.045(1)(b), the position includes anyone who is "able to exercise undue influence over the minor." The Court agreed that introduced a statutory ambiguity but resolved it using the "traditional tools of statutory construction" and agreed the legislature undoubtedly intended "to broaden first-degree sexual abuse to include abuse of a minor under the age of 18 by a person in a position of special authority or trust." The language in KRS 510.110(1)(d) indicates that the focus should be on the conduct of the "trusted" person, not on whether the minor consented, and further, that the sexual contact must be related to the trusted position of the perpetrator. The Court agreed the intent was to protect minors in such situations, "regardless of whether their participation [would otherwise be deemed] voluntary."

In addition, the Court disagreed that the phrase "position of authority" or "position of special trust" was vague. Clearly, in this case, his position as the minor's uncle, with the minor living in his household, qualified the victim as a household member.

The Court upheld his plea.

PENAL CODE – KRS 511 – BURGLARY

Adams v. Com., 2013 WL 1701467 (Ky. App. 2013)

FACTS: On April 4, 2011, Adams allegedly broke into the Cornelius home in Tompkinsville. The Cornelius's son, Brad, was home and saw Adams trying to break into the basement door. He identified the vehicle and Adams was promptly captured. Brad identified Adams. He later stated that he thought Adams left because he heard Brad inside. At trial, Brad testified that the "person ha[d] his foot on the doorstep as he fled." He could see the damage to the basement door from his vantage point.

Sheriff Barlow (Monroe County SO) testified that the door was recessed and that if the door had been broken, as it was, that "at least some part of that person's body would have been inside of the house." However, he admitted that there was no evidence anyone had actually entered and that the only evidence taken was photographs of the door. A another witness testified that the door was partially pushed open.

Adams was convicted of Burglary 2nd, and appealed.

ISSUE: Must some part of the body have to cross the threshold for a burglary?

HOLDING: Yes

DISCUSSION: The Court looked to Paulley v. Com. and agreed that the "evidence would have permitted a reasonable juror to conclude that some part of Adams' body, or at least some instrument, had crossed the threshold to the house in order to force the door open," and that was sufficient.[4] Further, even though he took nothing, it was permissible for the jury to infer that he intended to commit a crime and simply fled when he realized Brad was home.

Johnson v. Com., 2013 WL 2297105 (Ky. 2013)

FACTS: Lexington police arrived in response to a complaint about excessive noise from an "outdoor gambling activity." Upon arrival, they focused on a car in an adjacent lot, where Johnson was sitting in the driver's seat listening to music. Officers Terry and Doane approached because the "music blaring from its speakers exceeded the noise ordinance's allowable level." As soon as they approached, Officer Doane, on the passenger side, "immediately smelled the strong odor of burnt marijuana." He told Officer Terry as Terry was checked Johnson's documents. When Officer Terry returned the items, he reached inside and also smelled the marijuana.

Johnson denied having anything illegal in the vehicle. Officer Terry walked around to the driver side door, opened it, and instructed Johnson to get out. Instead, Johnson refused, started the car and gripped the wheel. Officer Terry was wedged in the open door with one hand on the wheel and the other on the doorsill. As Johnson shifted the car into drive and accelerated, Terry had to jump aside. Officer Terry, on a bicycle, gave chase. Other officers spotted the vehicle in front of a home and were told that a "stranger was inside." They swept the house with a dog, found Johnson and arrested him.

Johnson was ultimately convicted of Wanton Endangerment, Fleeing and Evading, burglary and related charges. He appealed.

ISSUE: Does knowing the occupant permit an entry for the purposes of Burglary?

HOLDING: No

DISCUSSION: Johnson argued that the proof did not support a conviction for Burglary 2nd. The occupant of the home, Warren, was not home. She had a relationship with Johnson some two years previously but did not give him permission to

[4] Paulley v. Com., 323 S.W.3d 715 (Ky. 2010).

enter – and called the police when she found him there. (In fact, Johnson could not recall her name, either, but simply asserted that he'd had sex with her before.) At some point, some time back, he may have had permission to enter unannounced, but "that was well before the incident in question occurred.) However, there was "much lighter" evidence that he intended to commit any crime while there. The only suggestion for his presence there was an intent to "wait out the police pursuit." At most, he committed the crime of Criminal Trespass by entering.

The Court reversed his conviction for Burglary.

PENAL CODE – KRS 515 – ROBBERY

Lewis v. Com., 399 S.W.3d 795 (Ky. App. 2013)

FACTS: On March 8, 2011, Thomas was working at a convenience store in Lexington. He was approached by Lewis who told him to "give me all the money." Lewis's hand was in his coat pocket. Thomas stepped away momentarily, and returned, "at which time Lewis propped his hand, still inside his jacket pocket, up on the counter and again demanded money." Thomas testified he believed Lewis had a gun and he gave him the money. Lexington police arrived and viewed the surveillance footage. One of the officers recognized Lewis, whom they had encountered earlier in the evening.

The next night, Robinson was "shoved and robbed by Lewis." Robinson chased him down, demanding the return of the money. Robinson and Clark (his cousin) held Lewis for the police. Lewis was charged with Robbery 2nd and Alcohol Intoxication. Upon being questioned, he admitted to robbing the convenience store as well, but said he did not have a gun. Lewis moved for a directed verdict, arguing there was no evidence he'd "used, or threatened to use, force during the Thornton's robbery." He was convicted and appealed.

ISSUE: May a threat of physical force be implied?

HOLDING: Yes

DISCUSSION: The Court agreed that while there was "no evidence that Lewis expressly threatened the use of physical force against Thomas." However, in Tunstull v. Com.[5] and Birdsong v. Com.[6] it had ruled that the threat of physical force "can be implied by a defendant's conduct. In this case, it was reasonable for a jury to find that Lewis was, in fact, threatening force.

Lewis's conviction was affirmed.

[5] 337 S.W.3d 576 (Ky. 2011).
[6] 347 S.W.3d 47 (Ky. 2011).

PENAL CODE – KRS 524 – TAMPERING WITH PHYSICAL EVIDENCE

Gordon v. Com., 2013 WL 1776075 (Ky. App. 2013)

FACTS: Gordon was charged with Murder and Tampering with Physical Evidence. He allegedly shot and killed Beals over a dispute concerning the use of a stolen moped. Gordon agreed he'd shot Beals but claimed it was in self defense. He admitted to leaving the scene with the firearm. Gordon was ultimately convicted of reckless homicide and tampering. He appealed.

ISSUE: Is simply leaving the scene with a firearm used in a crime Tampering?

HOLDING: No

DISCUSSION: Gordon argued that simply leaving the scene with the weapon was insufficient to prove tampering.[7] Gordon testified that he took the gun to his sister's and put it on the counter, and she testified that he was in a "state of shock and disbelief." She moved to gun from the countertop to under the sink as there were children in the house. Gordon left the next morning and his sister gave the gun to a friend for safekeeping. Gordon turned himself in a week later, after he had enough money to hire an attorney. The Court noted that his sister was not charged with anything and she told the police to whom she'd given the gun. (The gun was never recovered.) There was no indication that Gordon did more than place the weapon in a conventional location, the counter.

The Court reversed the conviction for Tampering.

PENAL CODE – KRS 525 – TORTURE OF AN ANIMAL

Staley v. Com., 2013 WL 2359648 (Ky.App. 2013)

FACTS: In December, 2010, Staley lived with his wife (Ismelda) in Christian County, along with four dogs. One night, while Staley was playing with one of them, a Jack Russell named Baxter, Baxter nipped him. He choked the dog, ran water over him and consigned him to the backyard, chained. The next morning, however, Baxter was inside. Ismelda went to work and when she returned, Staley "smelled of alcohol and Baxter was missing." He was evasive but finally showed her a garbage bag containing Baxter's body. It was determined that "Baxter had been skinned from the top of his scalp to the base of his tail." Ismelda filed a report and Staley was indicted for abuse of the dog.

[7] Mullins v. Com., 350 S.W.3d 434 (Ky. 2011).

Staley claimed he'd killed Baxter by choking because he bit him again. He panicked and began to cut on the dog to find the micro-chip, thinking it could be used to locate the dog. Failing to find it, he stopped and placed the dog in the bag. He claimed the dog was dead when he began to cut him.

At trial, Staley was convicted for Torture of a Dog or Cat and appealed.

ISSUE: Does proof that an animal responded while being cut indicate torture?

HOLDING: Yes

DISCUSSION: The Court noted that the evidence submitted, that Staley himself stated that the dog fought while being choked, squealing and yelping, and that the blood and the damage to the dog's body indicated more than the "limited cutting" he admitted to, was sufficient for a jury to find torture. Further, the mention of the blood in the bathroom suggested that "Baxter's heart was still beating when he was skinned," and although no testimony was presented to that effect, it was reasonable for the jury to infer it.

Staley's conviction was upheld.

PENAL CODE – KRS 530 – UNLAWFUL TRANSACTION

Hale v. Com., 396 S.W.3d 841 (Ky. 2013)

FACTS: Hale's stepson was married to the sister of a 14 year old girl – Hale became involved in a sexual encounter the girl. Prior to the encounter, Hale and his wife had stepped in to assist the girl's father, who was increasingly disabled with cancer. Hale and the girl became close and following her father's death, even closer. At some point, their conversations became sexual and intimate. On October 18, 2008, they had intercourse. In early December, Christian County CPS received an anonymous tip that "something might be amiss." Upon investigation, she admitted having had sex with Hale and the police became involved. Hale admitted the one incident and that it was a mistake. He was indicted for Unlawful Transaction with a Minor, but at trial, the jury was also instructed on Rape 3d. He was convicted of the Rape charge and appealed.

ISSUE: Is inducement of a minor to engage in unlawful sexual conduct an Unlawful Transaction?

HOLDING: Yes

DISCUSSION: Hale argued that it was only appropriate that he be charged with Unlawful Transaction if he induced his victim to commit a crime, not, as in this case, an unlawful sexual act. The Court looked to the history of KRS 530.064 and cases that

flowed from it, regarding a defendant soliciting sex from an underage victim. In those cases, the Court "presumed that for UTM purposes a minor 'engages in illegal sexual activity' if he or she willingly participates in sexual activity that is illegal only because the minor is not old enough to consent to it." The Court agreed that the minor themselves did not have to be committing a crime for UTM to apply. The Court agreed with Hale that because of the overlap between the Sexual Offenses (Rape, Sodomy, Sexual Abuse) and UTM, it is possible for conduct that constitutes a Rape 3d (as what the case here), a Class D felony, could also be prosecuted and sentenced as a Class B felony under UTM. The Court noted that the sexual offenses are very complex, and that such complexity was recognized by the General Assembly, which defined "several sex offenses broadly and allowing some degree of overlap among them."

The Court upheld Hale's conviction.

NON-PENAL CODE – FAILURE TO REGISTER AS SEX OFFENDER

Canada v. Com., 2013 WL 1919406 (Ky. App. 2013)

FACTS: In 2010, Canada lived in McCreary County. He was in compliance with his required sex offender registration. In August, he told his parole officer that he was going to need to move, as the property (owned by his aunt) was going to be sold. He reiterated this early in September, repeating that at that point, he did not have a new address. He was told to approve the new address with his parole officer before he registered it. In September, he secured a house and tried to contact the parole officer but her cell phone voice mail was full. He moved into the new location between the 15th and the 22nd. He called the parole officer's office on the 24th and was told to report on the 27th to change his registration. He did so, but was told that there was a warrant for his arrest (presumably for failure to register) and that he needed to go to the Sheriff's Office. He promptly did so, but at that time, there was no one there "who had the authority to arrest him." He returned later that day and was arrested for failing to register.

At trial, the records for the state-issued cell phone used by the probation officer were introduced. They showed a lot of activity prior to September 7, then no activity at all until September 28, the time frame during which Canada was trying to contact her. Several witnesses testified that he "unsuccessfully tried to call" the "probation officer numerous times during the moving process" and that he was forced to move by the sale of the property.

He was convicted and appealed.

ISSUE: Must a failure to register as a sex offender be intentional to be a crime?

HOLDING: Yes

DISCUSSION: Canada argued that the Commonwealth did not prove "every element" of his charged crime – "especially the all-critical element of intent to violate the statute." In this case, the Court agreed that the "element of mens rea is central." Prior to 2006, mens rea (mental state) was unnecessary in proving the crime, but at that time, KRS 17.510(11) was amended to include the mental state of "knowingly." The Court found that the parole officer violated her duty to keep in contact with Canada, particularly when she knew he had a pending move. No evidence was introduced to explain why the phone was unavailable for three weeks. In addition, the Court noted that the probation officer is married to the prosecuting law enforcement officer in the case, who sat at the Commonwealth's table during the trial. The Court found that the "potential conflict of interest has clearly cast aspersions on the probity of the entire proceedings."

The Court noted that there "was no evidence that Canada knew how much time he had to change his registration," and he had argued that in the past, he'd always gotten the forms from his probation officer. The probation officer put him in a Catch-22, he "was forced to move, could not reach his parole officer in order to comply with the terms of supervision, and then was arrested when he followed the instructions of the co-workers of his parole officer by registering without pre-approval." And "ironically, when he initially presented himself for arrest, again no one was available to execute the arrest." So, "instead of fleeing, he went to lunch and came back to submit to arrest." The Court agreed that he "was placed in a nearly impossible situation due to the unexplained unavailability of his parole officer." He "consistently attempted to comply" with the law.

The Court agreed he was entitled to a directed verdict and reversed his conviction.

FORFEITURE

Clay v. Maggard, 2013 WL 1701587 (Ky. App. 2013)

FACTS: On April 28, 2009, Maggard was driving in Franklin County. Trooper Gosser spotted him driving in a careless manner and made a traffic stop. A drug dog alerted on the trunk. No controlled substances were found, but over $130,000 in cash was seized.

The DEA had been investigating Maggard, and a buy had been arranged. Eventually the money was turned over to the DEA. Maggard was charged for conspiracy to distribute cocaine and in a plea deal, he agreed to forfeit the money. Eventually, however, he sued KSP for the money. The trial court concluded that the KSP and individual defendants were immune from suit. Maggard appealed.

ISSUE: Does a plea deal to forfeit seized cash apply to all agencies involved?

HOLDING: Yes

DISCUSSION: The Court noted that it was clear that Maggard entered into a plea agreement concerning forfeiture of the money. As such, he was estopped from seeking the return of the money.

The forfeiture was affirmed.

Osborne / McClain v. Com. 2013 WL 2450536 (Ky. App. 2013)

FACTS: Osborne was convicted of Facilitation to Traffick in a Controlled Substance, 1st. The Commonwealth moved to take in forfeiture cash, a pickup truck and a cell phone. The vehicle was titled in the name of both Osborne and McClain (his mother), and it was apparently paid for from a savings account in both of their names. The vehicle was insured by McClain. McClain argued that she was the "innocent owner" of the truck and that therefore, it could not be forfeited. (She claimed to know nothing of her son's drug activities.)

Following a hearing, the Court ruled that Osborne's half would be forfeited and that McClain could either buy that half or the vehicle could be sold, with half of the proceeds going to McClain. Osborne and McClain appealed.

ISSUE: Is an innocent partial owner of a forfeited vehicle entitled to the entire vehicle if seized?

HOLDING: No

DISCUSSION: The Court reviewed KRS 218A.410 and agreed that the truck was subject to forfeiture, since it was used in the drug crime. The Court noted that it was not contested that McClain was an innocent owner, but only whether she was entitled to the entire truck under that argument. The Court noted that Osborne was apparently buying the truck, making payments to his mother. The paperwork showed, however, that Osborne was a one-half owner of the vehicle and that the manner of dividing the truck was proper. The decision of the Mason Circuit Court was affirmed.

CONTROLLED SUBSTANCES

Greer v. Com., 2013 WL 2120333 (Ky. App. 2013)

FACTS: On June 23, 2010, Officers Young and Walker (Lexington PD) were on patrol on bikes. They saw Greer walking with another person and when Greer saw them, he "immediately moved to a nearby corner." There he engaged with another subject and began to "behave furtively." They saw that he was "attempting to transfer or conceal something at waist level while in the presence of the other man." He became "visibly startled" when he saw the officers and walked away quickly, while attempting "to shove something into the zipper of his shorts." They ordered him to

stop; Officer Young got off the bike and grabbed Greer's arm. Greer got loose and hurdled the bicycle. The officers caught him and they struggled; he was ultimately tased. He was arrested and searched; a large quantity of crack cocaine was found in a baggie, hanging out of his zipper. He also had a large amount of cash, including 17 $20 bills.

At trial for trafficking, Det. Ford testified as an expert. He noted that quantity was the big difference between personal use and trafficking. In his experience, he testified, anything over 10 grams was indicative of trafficking; Greer had approximately 80 grams. He noted that usually. .2 grams went for $20, and that it was normally "eyeballed."[8] He estimated the value of the cocaine Greer carried to be about $7,200 and testified that it was the one of the largest amounts he seen recovered from a single defendant.

Greer moved for suppression and was denied. He was convicted of trafficking, fleeing and evading and related charges. He appealed.

ISSUE: Can one "attempt" a trafficking offense?

HOLDING: No

DISCUSSION: Greer argued that he should have gotten an instruction for an "attempt" to traffic, but the Court noted that under Kentucky law, any attempt to traffic is, in fact, trafficking, even if unsuccessful or incomplete. Although the Court agreed that an attempt to traffic could apply in some situations, since Greer had sufficient cocaine on his person, the jury could infer that he intended to traffic.

Greer also argued the officers lacked any reasonable articulable suspicion that criminal activity was afoot when they approached him. The Court reviewed what had been presented and agreed that the officers did, in fact, have sufficient cause to stop him.

Greer's conviction was affirmed.

FAMILY – DVO

Evans v. Evans, 2013 WL 1932929 (Ky. App. 2013)

FACTS: On April 23, 2013, Paul requested a DVO against Ebony, who , he contended, had argued with him in front of their six-week-old daughter and Ebony's 8 year-old-son. He claimed she had snatched and grabbed the baby from him while he was feeding her, causing him to nearly drop the baby several times. He had tried to go to another part of the house, but she "followed him and would not permit him to close the door." He pushed her away in order to do so, but she "kicked the door open and forced her way into the room." The police defused the situation, but Evans feared that

[8] This was to explain why he had no scales.

she would harm him or the children. He had been given an EPO and a DVO was subsequently issued.

Ebony Evans appealed.

ISSUE: Is reasonable fear of harm enough for a DVO?

HOLDING: Yes

DISCUSSION: Although the record was not submitted to the appellate court, the briefs provided referenced the hearing and the testimony. The Court agreed that the evidence submitted supported the decision to issue the DVO. The Court upheld the DVO.

Harmon v. Wedding, 2013 WL 2150681 (Ky. App. 2013)

FACTS: On April 15, 2012, a domestic dispute occurred at the Jefferson County home of Harmon and Wedding, a married couple. During the verbal dispute, Wedding started an audio recorder in his pocket and Harmon tried to take it. She claimed that when she did so, "Wedding lunged at her and pushed her to the ground," then "slammed her head on the ground and also bit her hand." Further, she argued he held her down. Wedding claimed that they wrestled and then fell. He agreed he did sit on her and hold her hands down. He released her when their four-year-old daughter opened the door. Harmon picked up the child and ran to the neighbor's house. Wedding followed carrying their one-year-old daughter. Wedding was allowed to stay but the neighbor asked Harmon to leave. Harmon called the police and Wedding was arrested. Harmon obtained a EPO. However, at the subsequent DVO hearing, the Court dismissed and Harmon appealed.

ISSUE: Does a dispute automatically indicate that a subject should be in fear, and justify an EPO?

HOLDING: No

DISCUSSION: The Court looked the KRS 403.750(1) and its definition of "domestic violence and abuse." The Court agreed that it is up to the trial court as to whether to grant or deny a DVO. In this case, the Court noted that the "evidence presented was both contradicting and conflicting." The Family Court had noted that "both Harmon and Wedding's behavior was deplorable." The Court agreed, however, that Wedding's actions did not cause Harmon to suffer an assault or physical injury or the fear of same."

The Jefferson Circuit Court's decision is affirmed.

Jones v. Spivey, 2013 WL 1349304 (Ky. App. 2013)

FACTS: In early 2012, Jones and Spivey were involved in a divorce. Jones had two older children, Spivey one and the couple had one child together. On January 9, 2012, Spivey requested and received an EPO. At the subsequent hearing, six witnesses, testified and conflicting accounts were presented. According to Spivey, Jones struck her with a boot in the forehead multiple times. She recounted other instances of physical violence as well. Jones testified that Spivey instigated the fight and struck him with the boot, causing a laceration on his head. He disputed other claims and argued that she was seeking an EPO to gain leverage in the custody battle. The Court ruled that domestic violence had occurred and entered a 3-year DVO. He appealed.

ISSUE: Does the trial judge retain the authority to judge credibility of witnesses in a DVO hearing?

HOLDING: Yes

DISCUSSION: The Court noted that the trial judge was "in the best position to judge the credibility of the witnesses and weigh the evidence presented." As such, the Court agreed that its decision was not clearly in error.

The Court upheld the issuance of the DVO.

Wheeler v. Com., 2013 WL 2660625 (Ky. App. 2013)

FACTS: On April 30, 2010, Wheeler called 911 three times. The first two indicated that Sparks had stolen her truck and money, was drunk, and was driving without a license. The third call indicated that she had shot Sparks, who subsequently died. At trial, Owens testified that he drove Sparks to Wheeler's residence and that the couple "immediately began to argue." Owens testified that it was not physical, only verbal. Sparks went inside three times and the third time, Wheeler "grabbed a gun and discharged it three times in her home." At some point, he said, Sparks got the gun away from her. "While he and Sparks were walking outside and down the porch, Wheeler shot Sparks in the back." Wheeler claimed that Sparks refused to leave and "began abusing her," and that the gun discharged during the struggle. She admitted shooting as he left but testified she did not intend to actually shoot him.

Evidence was admitted that the police had responded to several earlier calls of domestic violence and that Sparks had pled guilty to three prior instances of Assault 4th against Wheeler.

Wheeler was eventually convicted of Manslaughter 1st and appealed.

ISSUE: Must an act of domestic violence be occurring at the time for the domestic violence exception in the homicide statutes to apply?

HOLDING: No

DISCUSSION: Wheeler argued that she was entitled to a reduction in her sentence due to the domestic violence exception in KRS 439.3401(5), which would exempt her from the 85% rule which would otherwise apply because she was classified as a violent offender. The Court disagreed that the exception did not apply (as the trial court indicated) because there was no act of domestic violence ongoing at the time he was shot.

The Court ruled that the trial court should look at the totality of the evidence to determine whether there was any connection between the shooting and domestic violence.

Wheeler also argued that she was entitled to invoke the Castle Doctrine, KRS 503.085. She had raised the issue prior to trial in an attempt to have the indictment dismissed. At a hearing, the Court had ruled that the force used was unjustified, and that decision was "thoroughly considered and rejected" by a subsequent jury.

The Court upheld the conviction, but ruled that the sentence must be reconsidered.

SEARCH & SEIZURE – SEARCH WARRANT

Bellamy v. Com., 2013 WL 2450500 (Ky. App. 2013)

FACTS: On November 6, 2008, Wilkins and Gunter went to the Black Cat Tavern in Ohio County. About 12:30 a.m., they left together. Wilkins "became belligerent" with Gunger and tried to choke her. He struck her in the face, knocking her glasses off. Her nose was broken. She stopped the car and made Wilkins get out, and then turned the car and headed back to the tavern. On the way back, she was crying. She encountered a dark-colored SUV but could not further identify it. The next morning, Wilkins was found dead, having been struck by a car.

Trooper Whitaker went to talk to Gunter; Bellamy was also present. During the discussion, he learned Bellamy had also been at the tavern. He looked at Bellamy's vehicle, seeing a small crack in the turn signal light. He applied for a search warrant and obtained swabs from the front that matched Wilkins' blood.

Bellamy was ultimately convicted of Manslaughter 2nd and leaving the scene. He appealed.

ISSUE: Must there been a better specific identification of a vehicle in a warrant to justify a search of that vehicle?

HOLDING: Yes

DISCUSSION: Bellamy argued that the search warrant was insufficient. Upon appeal, in addition, the prosecution argued that it did not need a warrant to secure the DNA evidence. The Court disagreed with the latter, noting that the "physical seizure of Bellamy's vehicle, coupled with a detailed examination of its undercarriage" was an encroachment into Bellamy's reasonable expectation of privacy.

With respect to the warrant, The Court noted that the affidavit "sets out the scope of [the trooper's] investigation in considerably detail." However, "on the key matter of the identification of Bellamy's vehicle as the suspect vehicle, the affidavit merely states that Bellamy's vehicle matched the description of an oncoming vehicle seen by Gunter shortly before Wilkins was killed." In addition, "Gunter never was able to give more than a very general description of the vehicle which she saw that night." The Court agreed that without more specific information, it had to conclude that the affidavit was insufficient.

However, the Court noted, U.S. v. Leon[9], the good faith exception, might apply. The Court agreed that although the trooper did not mention that "Gunter was unable to give a detailed description of the vehicle she saw, it also failed to mention that he saw slight damage to the front. The "exclusion of both of these facts suggests that their omission was not intended to mislead the judge issuing the warrant."

The Court agreed that Leon applied and affirmed the Ohio Circuit Court's decision.

Johnson v. Com., 2013 WL 2359721 (Ky. App. 2013)

FACTS: On November 19, 2010, officers obtained a search warrant for Ballard's "suspected methamphetamine house" in Hardin County. The warrant was very specific, but also included "catch-all language to provide for a search 'on the person or persons of: any and all present found inside residence during the execution of the search warrant.'" Det. Stroop's affidavit stated that video was taken by a CI doing controlled buys and showed other subjects using drugs inside the house. No identifying information for others who might be present was given.

As they approached to serve it, "two men [Ballard and Johnson] ran out of the house, were ordered to the ground and immediately handcuffed." They recognized Johnson from the video. Trooper Payne "frisked Johnson and emptied his pockets, finding keys, a cigarette pack and a cell phone." Methamphetamine was found inside the pack. Until the drugs were discovered, Trooper Payne testified that "Johnson was only being frisked as a protective measure and was not under arrest."

Johnson was indicted with possession of a controlled substance. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does "all persons present" in a warrant automatically justify a search of all individuals who are on the premises?

[9] 468 U.S. 897 (1984)

HOLDING: No

DISCUSSION: The Court looked to Com. v. Smith[10] and agreed that the "all persons present" clause was "invalid for lack of specificity in the description of the persons to be searched." It agreed that perhaps the trooper had "sufficient evidence to adequately identify Johnson with specificity in the affidavit and search warrant, either through a physical description or picture taken from the video, he failed to do so." Under the warrant, anyone on the premises, "no matter how innocent, could have been searched under the 'all persons present' clause." His "after-the-fact testimony" identifying Johnson with the video "cannot correct the facial invalidity of the search warrant."

The Court found "no justification for allowing the search of Johnson's cigarette pack." Johnson was not under arrest, and the drugs were not discovered as a result of "plain feel" during the court of a frisk.

The Court agreed the evidence should have been suppressed.

White v. Com., 2013 WL 1776082 (Ky. App. 2013)

FACTS: In September, 2009, Det. Curtsinger (Lexington PD) was told by a CI that Niehaus was going to buy Oxycodone from a specific individual. A first name and address were supplied. The CI advised she'd seen Niehaus buy pills five times before. Det. Curtsinger's investigation identified the seller as White. On October 19, the CI advised that Niehaus was buying another buy, that day. At the detective's requires, the CI requested four pills, and Niehaus agreed to serve as the middleman in the deal. The CI was provided with the money and driven by the detective to the house. They were to meet Niehaus at the location, and only Niehaus would enter. Det. Curtsinger observed the CI provide Niehaus with the cash. "Niehaus quickly returned from the trailer and handed the pills to the informant." The CI returned to the detective and handed over the pills. A second buy, this time recorded, as made the next day.

Det. Curtsinger's investigation showed that White had been convicted at least four times on drug related charges. He also learned from another officer that a recent search of White's home had uncovered marijuana and illegally possessed prescription pills and that charges were pending. Det. Curtsinger got a search warrant.

On October 21, 2009, 20 Oxycodone, 31 Methadone, marijuana, scales and other items were found, pursuant to the warrant. White was indicted on a variety of drug offenses. He moved for suppression, arguing that he'd made no sales to the CI, but that there was only proof of controlled buys between Niehaus and the CI. He also noted that the warrant was based on hearsay, from Niehaus to the CI and then to the detective. The

[10] 898 S.W.2d 266 (Ky. App. 1995).

Court ruled that there was sufficient evidence for the warrant, and if, in the alternative, there was not, that it was still a good faith situation under U.S. v. Leon.[11]

White took a conditional guilty plea and appealed.

ISSUE: Does evidence of a hand-to-hand transaction support a warrant?

HOLDING: Yes

DISCUSSION: White argued that the information used to obtain the warrant "was insufficient, lacked any indicia of reliability, and was wholly lacking in probable cause." Even accepting that the "physical exchange" only occurred between the CI and a third party, the overall information presented a "fair probability" that evidence would be found at the house.

The Court upheld White's plea.

SEARCH & SEIZURE – CONSENT

Campbell v. Com., 2013 WL 1776027 (Ky.App. 2013)

FACTS: Upon investigation in suspicious purchases of pseudoephedrine, Breckinridge County officers focused on Campbell and Metten, who shared a home. Learning that Metten had an active warrant, they went to the house. Metten answered the door, but the officers didn't realize it immediately; he denied that Metten was home. He also said he didn't know if Campbell was there. A child, age 9, appeared and said that Campbell was in fact there and let them in. Once inside, the officers smelled ether. Campbell, two other adults and several children were present.

Metten fled from the house, through the back door. Officers pursued him through the house and one spotted evidence of the ongoing production of methamphetamine. All of the occupants were cuffed; consent to search was sought and received. Officers found marijuana, evidence related to methamphetamine and a shotgun.

Campbell was indicted. A motion to suppress was discussed but the issue of the age of the child that admitted them was not expressly raised as an issue. The Court noted in its decision that there was a valid arrest warrant for Metten, so they had a right to chase him; that Campbell's girlfriend (who was Metten's mother) gave written consent, and that once inside, they had exigent circumstances.

Campbell took a plea to manufacturing methamphetamine and was convicted on the remaining charges. After a complicated process in which Campbell argued his counsel was deficient in a RCr 11.42 hearing; the Court ruled that the decisions pursued in the trial were strategic and denied the motion. Campbell appealed.

[11] 468 U.S. 897 (1984).

ISSUE: May a very young child give consent to enter?

HOLDING: No

DISCUSSION: The Court looked at Campbell's claim and noted that the "youngest age at which courts in Kentucky have recognized the validity of a person's consent is 'high-school aged.'"[12] The Court noted that a child's age, while relevant, is not dispositive. However, the Court agreed that based on the obvious young age of the child in this cse, the officers could not reasonably believe that "a child of such an age possessed the requisite authority to grant consent" for them to enter. It continued, however, noting that under Payton v. New York, it was proper for the officers to enter to execute an arrest warrant, when they reasonably believe the subject of the warrant might be present.[13] Although they weren't sure that it was Metten that answered the door, when he fled, it was reasonable to chase and seize him.

The Court upheld Campbell's plea and conviction.

SEARCH & SEIZURE – TERRY

Malone v. Com., 2013 WL 1349295 (Ky. App. 2013)

FACTS: On August 10, 2010, Officer Noland (Louisville Metro PD) was working a "saturation detail" at the Riverview Apartments. He was told by other officers that there was some sort of a dice game going on at a location where loitering and trespassing was prohibited. They communicated that a man had immediately ridden away when they approached, on a bicycle, and for Officer Noland to watch for him. He spotted Malone riding through an alleyway in the complex and yelled at him to stop. Malone did so, but then got back on his bike and rode away. Officer Malone assumed he fled because he saw Police on the front of his shirt. Officer Noland caught up and grabbed Malone's shirt; Malone dropped the bicycle and ran.

Officer Noland gave chase while calling for backup. He kept him in sight and saw as he dropped some baggies containing what appeared to be drugs, and also placed something in his mouth. Malone was apprehended and brought to where the other suspects had been gathered. A booking van arrived and Malone was searched – marijuana and cocaine were found. He became ill in the van and vomited a powdery substance. EMS believed he'd ingested cocaine.

Malone was charged and moved for suppression. When that was denied he took a conditional guilty plea and appealed.

ISSUE: Are officers free to approach people on the street?

[12] Perkins v. Com., 237 S.W.3d 215 (Ky. App. 2007).
[13]

HOLDING: Yes

DISCUSSION: Malone argued that Noland did not have sufficient reason to stop and seize him. The Court, however, noted that under Florida v Royer, officers are free to approach any individual on the public street.[14] As for his reason to flee, it was clear that Noland suspected criminal activity related to the dice game and the information from the other officers, about a black male leaving an area on a bicycle, was sufficient to link Malone to the tip. Noland was entitled to rely on the description provided by the other offices to approach and seize Malone.

The Court upheld Malone's conviction.

SEARCH & SEIZURE – PLAIN VIEW

Jointer v. Com., 2013 WL 1701584 (Ky. App. 2013)

FACTS: On March 1, 2011, Officer Dellacamera (Lexington PD) pulled into a parking lot. He observed another vehicle "drive into the parking lot, stop briefly, and then immediately drive out of the parking lot." He recognized Jointer, who he had arrested the week before for driving without an OL. He initiated a stop and Jointer pulled over. As the officer approached, Jointer began to get out. He was ordered back into the car but did not put his hands on the steering wheel, as ordered. Instead, he reached for an "unidentified black object" on the passenger seat. Officer Dellacamera pulled his weapon and ordered Jointer out. Jointer got out, "dropped the object, and went down on the ground as instructed." He was handcuffed. Officer Dellacamera approached the open driver's side door and "observed in plain view a small corner of a plastic baggie in an open compartment of the vehicle containing what he suspected was cocaine." The baggy was "in an open compartment between the steering wheel and the driver's side door." The baggy was seized and the substance confirmed to be cocaine.

Jointer was indicted for possession of the cocaine and driving without an OL. He moved for suppression, which was denied. Jointer took a conditional guilty plea and appealed.

ISSUE: Is the location of the officer when they see contraband critical in the plain view analysis?

HOLDING: Yes

DISCUSSION: The Court agreed that it was "uncontroverted that the cocaine was plainly visible and the incriminating nature was immediately apparent from Officer Dellacamera's visual perspective." The question was whether the officer was "lawfully in a position to view" the baggy, however. The Court agreed that the officer was "simply

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standing between the open door and passenger compartment of the vehicle" when he spotted the item and he was in a "lawful position outside the vehicle when he viewed" it.

The Court affirmed the seizure of the cocaine.

SEARCH & SEIZURE – VEHICLE STOP

Stevens v. Com., 2013 WL 1919527 (Ky. App. 2013)

FACTS: On the day in question, Officer Cottingham (Nicholasville PD) was contacted by Det. Bruner about a drug transaction that Bruner and another officer had observed. Officer Cottingham went to the location, a Shell gas station. He saw a man near the suspect vehicle and two persons in the vehicle. Det. Bruner, on a cell phone, told the officer to stop the suspect vehicle and Cottingham pulled in behind, blocking it in, and activated his lights. He spoke to the driver, Stevens, and had him get out. He was then handcuffed. Det. Bruner arrived and explained that the person who had been nearby had gotten out of the suspect vehicle, and the man (Stamper) said that he'd just purchased 50 oxycodone for $1,000. (He was not given Miranda before making that admission.)

Stevens was convicted of complicity to traffic in a controlled substance and appealed.

ISSUE: May an officer make a stop based upon suspicious activities of vehicles?

HOLDING: Yes

DISCUSSION: Stevens argued that Officer Cottingham lacked sufficient cause to stop him. The Court, however, reviewed the information provided by the detective, on what they had observed with respect to the movements of the suspects and their vehicles. Considering that information, the Court agreed that it was proper for Stevens to be stopped by Cottingham.

Stevens' conviction was affirmed.

Ruff v. Com., 2013 WL 1789861 (Ky. 2013)

FACTS: On November 24, 2008, Ruff, Benton and Robinson entered a clothing store intending to rob the store and its customers. Ruff fired his weapon twice and struck the owner, Abderlrahman, killing him. They fled the scene with the customers' wallets. Officer Sheehan and Lunte (Louisville Metro PD) stopped Ruff's girlfriend, White, for an unreadable temporary tag. Ruff was a passenger. When the couple got out, Ruff fainted. Believing that Ruff had swallowed drugs, they got consent to search the car from White. (White later denied this.) They found a handgun and a large bag of clothing under the seat. Ruff admitted ownership of the items and was

arrested on unrelated charges. He was questioned five days later by LMPD and admitted to being involved in the robbery.

Ruff was charged with murder and robbery. He moved to suppress his confession, which was denied. Ruff was convicted and appealed.

ISSUE: May actions subsequent to a vehicle stop be used to lawfully extend the stop?

HOLDING: Yes

DISCUSSION: Ruff argued that the items found in the vehicle were located "as a result of an unconstitutional detention." The Court agreed that the tag violation supported the initial stop and that the search added only a few minutes to the process.

Further, although "the search of the vehicle went beyond the scope of the purpose of the traffic stop, Ruff's behavior gave rise to a reasonable articulable suspicion of criminal activity independent of the facts justifying the initial traffic stop." The "sudden loss of consciousness was suspicious, as it is common for individuals to pass out after ingesting narcotics." The Court found it credible that White consented to the search. And, since the detention was lawful, Ruff's admissions were also properly admitted.

With respect to the two statements made after he was taken into custody, the Court noted that he refused to sign the standard waiver of rights form. He did, however, seem to be willing to speak with the detectives. Ruff argued that his refusal to sign to the form was an invocation of his right to silence. The Court looked to the similar case of Campbell v. Com., "where a suspect was read his Miranda rights but refused to sign the rights waiver form."[15] In the second statement, Ruff engaged in small talk with Det. Middleton, who was sitting nearby working on an unrelated matter. Ruff stated "I can't believe I'm caught up in this," to which Detective Middleton replied, "If I was innocent, I'd get my side of the story out." Det. Middleton explained that Ruff didn't have to talk to him and acknowledged that Ruff had asked for counsel. He brought Ruff some food and then left. Ruff then rolled his chair in Sgt. Butler's office, revoked his right to counsel and continued to talk. The Court agreed that "Ruff, not the officers, resumed contact with officers after he had invoked his right to counsel." The Court did not agreed that Det. Middleton's statement was coercive.

The Court upheld Ruff's convictions.

Turley v. Com., 399 S.W.3d 412 (Ky. 2013)

FACTS: While on patrol in Muhlenberg County, Trooper Knight (KSP) saw Turley speeding. He followed, also noting the back license plate was not properly illuminated. He made a traffic stop. It was difficult to see into the cab of the large pickup, so the trooper asked Turley to get out, leaving two passengers inside. He gave Turley a FST,

[15] 732 S.W.2d 878 (1987).

which he passed. After verifying his documentation, Trooper Knight told Turley to "have a good night." Turley returned to the cab. Knight, however, returned with Turley to the cab and "undertook a detention of the two passengers pursuant to Terry v. Ohio, which permits a police officer to briefly detain a citizen if he has an individualized reasonable articulable suspicion that criminal activity is afoot."[16] Knight stated he planned to do a warrant check on the two passengers, as that was his "customary practice." He had no particular suspicion about them, however. He agreed he would have followed if Turley had driven off.

During the encounter, Turley had his arm on the center console, near a "small wooden box." The trooper asked what was in it, and Turley said it wasn't his, he didn't know. "Knight then repeatedly demanded to be told what was in the box" and ultimately demanded to "see what was in the box." Turley began to open it and Knight, thinking it might contain a weapon, seized it. A bag of marijuana fell out. Turley was arrested and placed in the cruiser. When one of the passengers refused to sit on the ground, awaiting a vehicle search, both passengers were arrested. A search of the vehicle revealed methamphetamine, two handguns and a large amount of cash. Turley was indicted for the drugs and being a PFO.[17] He moved for suppression and was denied. He was convicted and appealed.

ISSUE: May occupants of a vehicle be held past the point that all reasonable actions have been completed?

HOLDING: No

DISUCSSION: The Court noted that the trial court considered that the encounter, once Turley returned to the vehicle, was consensual, and disregarded evidence that suggested the contrary. The Court noted the trooper's own statements indicated that he "objectively *did not* intend to terminate the encounter when he finished checking [Turley's] credentials and sobriety." Rather, he stated that he *"I had him* get back in [the truck] and sit down . . . behind the steering wheel." If the trooper "had" Turley do something, it is a "reasonable presumption that "he compelled the doing of the act, and that the subject's compliance was in response to the compulsion." He apparently admitted that the only reason why he took Turley back to the truck was to be able to maintain control of all three individuals. He "agreed that after the initial stop, [Turley] was never again free to leave," By continuing to investigate the passengers, Knight put Turley into the position of a "mere bystander," who had to simply patiently wait for the conclusion of the trooper's business with the passengers.

Further, the trooper demanded to see what was in the box, which precipitated Turley opening it. Turley "plainly did so in response to the trooper's emphatic demand to 'see what's in the box.'" The Court further agreed that Turley was in custody the entire time and would not have reasonably felt free to leave.

[16] 392 U.S. 1 (1968),
[17] A charge for possession of the gun was done separately.

Further, the Court noted, the trooper stated specifically why he continued his control over Turley and the two passengers:

> … it was his routine practice to detain passengers under these circumstances to see who they are, and determine if they are "wanted persons." However, Knight had no authority to detain either [Turley] or the passengers for that purpose. Historically, this has not been a country in which citizens are required to heel to the demand of a policeman to "show me your papers," nor will we indulge law enforcement conduct that leads us in that direction.

In response to the Commonwealth's argument that the trooper was free to approach the car, the Court noted "it would produce an absurd result" to apply that rule in this circumstance. Allowing a police officer "to routinely extend the stop at his own initiation by application of the consensual encounter rule would, in practice, eviscerate the constitutional principle that a stop may not be extended longer than is necessary to accomplish its purpose."

The Court concluded:

> Moreover, in situations as we address here, many citizens do not perceive or understand a transition from a Terry- detention to a consensual encounter. Those who do must then make a decision that, as this case illustrates, can confound lawyers and judges: does the motorist risk being charged with the crime of resisting arrest or escape by assuming he is at liberty to leave and then doing so? Or, does he remain in place and create the appearance that he has consented to the continued intrusion upon his liberty? The stakes are too high for this Court to condone a police practice that fosters ambiguity about whether a suspect is "in custody." Our view in this regard is consistent with the legislative purpose of KRS 431.025, which requires an officer making an arrest to "inform the person about to be arrested of the intention to arrest him,
> and of the offense for which he is being arrested."

Finally, the Court refused to credit that there was an exigent circumstance when the box was opened. Looking to Kentucky v. King, the Court agreed that the Commonwealth may not rely upon the exigent circumstances exception to the warrant requirement under the circumstances presented because Trooper Knight himself created the exigent circumstances which led to his seizure of the box by illegally extending the traffic stop, and by illegally insisting upon disclosure of the contents of the box."[18] His own conduct created the exigency.

The Court suppressed the evidence.

INTERROGATION - SCHOOL

[18]

N.C., a Child Under Eighteen v. Com., 396 S.W.3d 852 (Ky. 2013)

FACTS: A teacher at Nelson County High School found an empty pill bottle on the floor in the boy's bathroom. The bottle indicated it was for N.C. and had contained hydrocodone. The school investigated the matter and determined that N.C. had given away some pills. N.C. was removed from class and brought to the office by Deputy Sheriff Campbell (the School Resource Officer) and the Assistant Principal, Glass. N.C. was questioned in the closed office with the SRO and Glass the only other persons present. Although initially denying he knew why he was there, N.C. finally admitted that he "did something stupid." He stated he had the pills with him because of recent dental surgery; he took one and gave two away to a fellow student. Glass told him that he was "subject to school discipline" and N.C. was ultimately expelled. After Glass left the room, Campbell told N.C. that "he would be charged with a crime and explained the criminal consequences." N.C. was ultimately charged as a Youthful Offender because of prior criminal acts.

N.C. was charged in juvenile court and requested suppression. At the hearing, Deputy Campbell testified that he had been in clothing that identified himself as a member of the Sheriff's Office and was armed. He had been the SRO for four years. The deputy did not tell N.C. he was free to leave the office during the questioning or give him Miranda[19] warnings. The Court denied N.C.'s motion and he took a conditional guilty plea. N.C. then appealed and ultimately, the Kentucky Supreme Court granted review.

ISSUE: If a student is being questioned at school, by or in the presence of a law enforcement officer, must they be given Miranda warnings?

HOLDING: Yes

DISCUSSION: The Court framed the question as whether "a student is entitled to the benefit of the Miranda warnings before being questioned by a school official in conjunction with a law enforcement officer" when criminal charges, rather than just school discipline, is possible. The Court began by reviewing Miranda, noting that the threshold inquiry is whether the subject is both being questioned by law enforcement and is in custody. But since that initial rule was established, the Court has held that in some situations, interrogation by non-law enforcement state actors may also be subject to the Miranda[20] rule. The Court also looked to a case from another state, in which the court ruled that when law enforcement isn't present, and the child is not subjected to criminal charges, Miranda is not implicated. The Court concluded that the "'law enforcement' requirement in Miranda may be contextual, or more related to function than to title."

[19] Miranda v. Arizona, 384 U.S. 436 (1966)
[20] See Mathis v. U.S., 391 U.S. 1 (1968) (IRS agent); Buster v. Com., 364 S.W.3d 157 (Ky. 2012) (social worker); Harsfield v. Com., 277 S.W.3d 239 (Ky. 2009) (SANE).

The question as to whether a person is in custody is objective, and at "its most basic," custody "requires a formal arrest or restraint."[21] The trial court must "determine the circumstances surrounding the interrogation and, given those circumstances, to decide whether a reasonable person would believe he could terminate the interrogation and leave."[22]

The second step is whether the statement was "voluntarily given," and absent Miranda warnings, when they are required, statements will be considered inadmissible as involuntary. This question was initially addressed in a pre-Miranda case, Fikes v. Alabama.[23] Following Miranda, warned statements will lean it toward the statements being given voluntarily, but that is "not the end of the inquiry." In Schneckloth v. Bustamonte, the Court laid out the "totality of the circumstances" test which views "knowledge of the right to refuse consent as a factor."[24]

With respect to juveniles, the Court looked to In re Gault.[25] In Gault, the Court reviewed the "development of juvenile legal issues to that point in time," and noted that when a juvenile is adjudicated for a public offense, the child's liberty can be restrained for many years. As such, the Court agreed that juveniles are entitled to due process, just as adults. The Court noted that "admissions and confessions of juveniles require special caution because a juvenile cannot be judged by the more exacting standards of mature adults." The Gault Court ruled that the "constitutional privilege against self-incrimination is applicable to the case of juveniles as it is with respect to adults."

The Court looked to J.D.B., in which the Court "did not even question whether Miranda applied, but looked directly at the question of whether the juvenile was in custody." J.D.B. was 13 when interrogated at school, threatened with juvenile detention and never given Miranda warnings. The J.D.B. Court noted that juveniles are particularly susceptible to the "influence of authority figures and the naturally constraining effect of being in the controlled setting of a school with its attendant rules." The Court framed the custody question as: "what were the circumstances surrounding the interrogation, and given those circumstances, would a reasonable person believe he could terminate the interrogation and leave?" The Court agreed that for juveniles, age was also a factor to be given some weight.

The Court then looked to Kentucky's Unified Juvenile Code and the due process requirements contained therein. The Court agreed that N.C. was in custody under the facts given. Under Kentucky law, KRS 610.200, when a peace officer takes a child into custody for an offense, the officer "shall immediately inform the child of his constitutional rights and afford him the protections required thereunder…." As such, once the Court determined that N.C. was in the custody of the SRO, he was entitled to have been informed of his rights, including those under Miranda.

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[21] Thompson v. Keohane, 516 U.S. 99 (1995).
[22] J.D.B. v. North Carolina, 131 S.Ct. 2402 (2011); see also Stansbury v. California, 511 U.S. 318 (1994).
[23] 352 U.S. 191 (1957).
[24] 412 U.S. 218 (1973).
[25] 387 U.S. 1 (1967).

The Court noted that "on its face," this was a school discipline matter and N.C. had "no reason to believe that he was facing criminal charges." The pills were his legal prescription. Although under Kentucky law, he did commit a crime by "transferring" the pills, "there is nothing to indicate that he knew this." Only discipline/expulsion was discussed with the assistant principal. Only after he confessed was N.C. told that he had committed a crime. The Court noted that the assistant principal had admitted to having a "loose routine" with the SRO and that they had done such questioning "in tandem" before. The Court stated also that "no reasonable student … would have believed that he was at liberty to remain silent, or to leave, or that he was even admitting to criminal responsibility under these circumstances." The Court acknowledged that had N.C. been over 18, the statements would not have been admissible. The Court observed that Glass was "acting in concert with the SRO," which made this situation "state action by law enforcement."

The Court agreed that "safeguarding children in our schools and maintaining appropriate discipline is an issue of paramount public importance." However, when a student is "questioned with more than school discipline in mind, there was a confluence of the student's rights and the needs of the school." The shift from "traditional in-school discipline toward greater reliance on juvenile justice interventions," even for "common school misbehavior," has led to students being put in contact with juveniles who have committed more serious offenses. "Such policies, which emphasize criminal charges, can serve to change the nature of questioning a student for purposes of school discipline into a criminal interrogation."

The Court stated that "to the extent that school safety is involved, school officials must be able to question students to avoid potential harm to that student and other students and school personnel." However, "when that questioning is done in the presence of law enforcement, for the additional purposes of obtaining evidence against the student to use in placing a criminal charge, the student's personal rights must be recognized." The Court agreed it was not reasonable to expect school officials "to understand all the ramifications" of such questioning, but "trained law enforcement is another matter." The Court noted that the "only viable reason to have law enforcement in the schools is to be able to assert peacekeeping and custodial authority over anyone who behaves in such a way that disorder ensues or a law is broken."

In short, the Court stated:

> Administering school discipline does not require the participation of law enforcement. Administering the law does.

The Court summed up the balancing act, noting that "school officials may question freely for school discipline and safety purposes, but any statement obtained may not be used against a student as a basis for a criminal charge when law enforcement is involved or if the principal is working in concert with law enforcement in obtaining incriminating statements, unless the student is given the Miranda warnings and makes a

knowing, voluntary statement after the warnings have been given." The Court agreed that in some cases, the presence of the SRO or other law enforcement officer "will maintain order and create a safer environment for the administrator and the student." However, it continued, "statements obtained without giving Miranda warnings are subject to suppression if a criminal charge is brought."

The Court ruled that the statements must be suppressed and reversed the conditional plea.

NOTE: *Although not binding in this matter, this opinion included a concurring opinion that addressed the "public safety exception" recognized in New York v. Quarles.*[26] *Under Quarles, certain statements made prior to Miranda might be admitted when limited to the need to resolve an immediate safety issue, such as the location of a weapon. In addition, in a lengthy dissent, one of the justices discussed the SRO program and the interaction between the school, the SRO and the law enforcement agency for which the officer works, if different from the school system. The Court characterized the situations as a "school official working with another school official who is required by law to be a law enforcement officer." The justice noted that if Miranda warnings are given, it must be assumed "those rights will be invoked" and if this occurs, the safety of the school might be jeopardized.*

INTERROGATION – RIGHT TO COUNSEL

Com. v. Goodnight, 2013 WL 1384913 (Ky. App. 2013)

FACTS: Goodnight was arrested in Minnesota. He had already been indicted in Hopkins County, Kentucky, on murder and robbery charges. When Minnesota authorities learned he was already wanted in Kentucky, they served the Kentucky process on Goodnight. Goodnight requested an attorney and the officer left without questioning him. A few hours later, Goodnight went to an extradition hearing. The investigating officer was present and Goodnight "mouthed words that he wanted to talk to" him. The detective "then made gestures to Goodnight to confirm if Goodnight wanted to speak to him, and Goodnight responded affirmatively." Their subsequent exchange at the Sheriff's Office was recorded. He said he wasn't waiving his right to an attorney but indicated that he wanted to speak to the officers. He was given Miranda, agreed to talk, and did so for several hours.

Goodnight was brought to Kentucky and requested suppression of his statements. The Hopkins Court sustained the motion, ruling that Goodnight had not "unequivocally waived his right to counsel prior to questioning." In fact, he specifically did the opposite. The Commonwealth appealed.

ISSUE: Must all questioning stop once a subject invokes their right to counsel?

[26] 467 U.S. 649 (1984); See also Henry v. Com., 275 S.W.3d 194 (Ky. 2008).

HOLDING: Yes

DISCUSSION: The Commonwealth argued that when Goodnight re-initiated contact with the Minnesota officers, he "did not make an unambiguous request for an attorney." They maintained "that all of Goodnight's words and actions, taken in concert, at best are only an ambiguous reference to the right to counsel." His statement that "I am not waiving my right to an attorney," went along with "a laugh and shrug, thus rendering it either a joke or not believable." They followed up with the question "do you want to speak with us or not," and he agreed that he did. The Court, however, agreed that under Edwards, once he actually invoked his right to counsel, questioning should have stopped. The Court upheld the suppression of the statement.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Anglin v. Com., 2013 WL 2257829 (Ky. App. 2013)

FACTS: Around March 18, 2009, Angling convinced Vincent to drive Meredith and him to meet someone. Instead, he was directed to the Gates of Hell Cemetery near the Breckinridge-Hardin County line. There, they attacked him, "placed him in a sinkhole, covered his body with debris, left him for dead, and left the cemetery in Vincent's vehicle." They picked up a juvenile on the way out of town and made it all the way to Texas before being arrested and returned to Kentucky.

Anglin was charged with Robbery 1st. After a lengthy delay, he was convicted and appealed.

ISSUE: Is calling a location by a "local" name permitted in testimony?

HOLDING: Yes

DISCUSSION: Anglin objected to the witnesses being allowed to call the scene "The Gates of Hell" Cemetery. The Court agreed that the robbery occurred in one of many cemeteries located in Breckinridge County and it was necessary to establish venue by identifying where the crime occurred. Although the apparently legal name of the cemetery Kasey's Cemetery, it was commonly known as the Gates of Hell, and that was the name by which the witnesses would recognize it.

The Court upheld the conviction.

Stone v. Com., 2013 WL 1919566 (Ky. App. 2013)

FACTS: On December 30, 2009, Wright-Gomez lived in an apartment in Louisville with her two sons, F.P. (age 13) and W.G. (age 8). Stone, her boyfriend, also lived there. On that night, at about 8:30, F.P. called 911 to report that his mother's boyfriend was beating her up. He was told by his mother to hang up the phone and he did. The

911 operator called back and Stone answered. She told him to put the person on the phone who had called and confirmed that he'd been told to hang up by his mother. He was also told to tell his mother that the police were on the way and the call could not be cancelled.

Officer Tillman (Louisville Metro PD) arrived. He saw that Stone matched the description provided of the boyfriend, and that Stone "was sweating, appeared to have just physically exerted himself, and had a scratch on his shoulder." The officer also saw that Wright-Gomez and the children were "very visibly upset, and were crying and shaking," although she denied any problem. Stone "took up an aggressive stance" when the officer was speaking to Wright-Gomez and threatened to "take away F.P.'s PlayStation and send him to the Home of the Innocents." He documented injuries, including marks on F.P. that indicated he'd been "grabbed across the face." Based on the statements of the boys and his own observations, the officer arrested Stone.

On the way to the jail, Stone made the following statement:

> He stated to me that he was a real criminal. Uh, he stated that he would not have hit the mother, but that he would shoot or kill someone, and that a charge of wanton endangerment was more his style. He, uh, continued on to say that if something, if it came out later that someone had killed the entire family, that would most likely be him.

While incarcerated, Stone made about 30 calls to Wright-Gomez. In those calls he made threats against F.P. At the preliminary hearing, Wright-Gomez claimed that "nothing had happened and asserted that her sons had made up the allegations because they did not like Stone." She was charged with Perjury but that was dismissed when she agreed to testify in Circuit Court. There she testified as to the altercation, which was precipitated by her finding a text message on Stone's cell phone. She agreed she may have struck him and that she threw his phone against the wall. Stone claimed he'd done nothing but restrain her, when she attacked him. Other witnesses testified in his favor as well.

Stone was charged, and convicted, of "retaliating against a participant in the legal process, two counts of assault in the fourth degree, and terroristic threatening in the third degree" and was also PFO. He appealed.

ISSUE: Is it proper for a witness to testify as to a matter that is in the purview of the jury alone – whether a crime actually occurred?

HOLDING: No

DISCUSSION: Among other issues, Stone argued that it was "improper for Officer Tillman to testify as to his belief that an assault had occurred." He also objected to the testimony of another witness, Cox, the prosecutor in the perjury case against Wright-Gomez, who had testified that she believed the allegations against Stone were true.

The Court agreed it was error to admit Cox's testimony, as the "law is clear that witnesses generally cannot testify to conclusions of law."[27] Given the "lack of additional independent evidence beyond the conflicting testimony given by Stone and the victim," however, the Court could not find that "Cox's statement as to the truth of the allegations did not factor heavily into the jury's decision and might have resulted in an outcome different than that which the jury may have reached absent such testimony." The Court looked to Berger v. U.S. as well, noting that a prosecutor's "improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."[28]

With respect to the charges of terroristic threatening and retaliation, however, the Court agreed that "sufficient independent evidence existed in the form of Stone's own statements to police officers and numerous phone recordings containing Stone's voice making threats to proceed with those charges."

The Court continued:

> To clarify, the evidence on the assault charges consisted only of the officer's evaluation of marks on the victims and the testimony of Stone and one of the victims. The prosecutor's statement could easily have tipped the scales of justice in favor of the prosecution. To the contrary, the evidence presented with respect to the retaliation against a participant in the legal process and terroristic threatening charges consisted of evidence independent from either the testimony of the victim or perpetrator bolstered by the prosecutor, i.e., the statements Stone made to the officer and the phone recordings.

With respect to Tillman's testimony, the Court noted that the response was due to a question. Specifically, Tillman said ""And at that point I determined that, uh, I had reason to believe that an assault had either just occurred or was occurring as I knocked on the door, believing I had exigent circumstances to enter that apartment and conduct an investigation." The Court agreed with the Commonwealth that his statements "were not conclusions of law, and that his statement of "reason to believe" an assault had occurred was given as an explanation for his belief in the need to continue the investigation to determine whether he needed to make an arrest."

With respect to the Assault 4th charge, with F.P. as the victim, the Court looked to KRS 508.030 and its use of the phrase "physical pain." The Court noted that it had held previously "that physical pain can be inferred by the act committed against the victim, as well as outward signs of injury."[29] The testimony by his mother that "Stone hit F.P. with a force sufficient to throw him to the ground and then began stomping on his chest" bolstered by Tillman's observations was more than enough to support the elements of assault. Further, his threats to Wright-Gomez never included a direct threat to kill or injury F.P., only a desire to do so." A threat against a family member was sufficient to

[27] *See* Bussey v. Com., 797 S.W.2d 483 (Ky. 1990), and Nugent v. Com. , 639 S.W.2d 761 (Ky. 1982).
[28] 295 U.S. 78 (1935)
[29] See Key v. Com., 840 S.W.2d 827 (Ky. App. 1992).

support the retaliation charge.[30] With respect to the Terroristic Threatening charge, his statement to the effect that ""If it came out later that someone had killed the entire family, that it would most likely be by [me]" was enough to prove the elements of that charge, as well. There was no need to prove that he actually intended to carry out the threat or that the victim was in fear of immediate injury.

The Court reversed the Assault 4th conviction (because of Cox's statement), but affirmed the remainder of the charges.

Morton v. Com., 2013 WL 2660364 (Ky. App. 2013)

FACTS: On December 16, 2010, a Super 8 hotel was robbed in Whitesburg. A man walked in and wandered around the lobby, receiving permission to use the restroom. Eventually he walked behind the desk and put a knife to the clerk's neck. Not happy with what was in the register, the robber forced the clerk into the office for more money. When he left, he told the clerk that if he called the police, he'd come back. The robber tried to force the clerk into a laundry room, but he refused. The clerk was able to run upstairs and the robber fled. The police arrived and the clerk provided a detailed description of the robber's clothing and that he had a "bushy goatee." The police searched the area and an nearby convenience store employee told them that Morton had been in a little earlier, wearing the same clothing. The money stolen was about $500 in small bills. A photo from the store's surveillance camera was shown to the clerk, who identified him as the robber.

Later that night, the police stopped a vehicle pulling out of Morton's driveway. Morton was in the back, trying to "conceal a large number of $1 and $5 bills, as well as rubber bands, between the vehicle's seat cushions." He had taken off the identified toboggan and jacket, but was wearing the same shirt as described by the clerk. When taken back to the store, the clerk identified him. Without the toboggan, the clerk also recognized him as the son of a former manager/desk clerk, explaining his knowledge of how the hotel worked.

Morton was indicted for Robbery and Retaliating against a Participant.[31] He was convicted and appealed.

ISSUE: May officers give specific testimony as to an "ultimate issue" in a trial?

HOLDING: No

DISCUSSION: Morton argued that testimony given by officers entitled him to a mistrial. Officer Slone testified that Morton's clothing matched the description of the clerk. The defense objected, arguing that was a question for the jury. The next witness,

[30] See KRS 524.010. The Court also noted that as a mnor, it would have been his mother's responsibility to get him to court to testify.
[31] A Theft charge was dismissed.

Chief Fields, testified that he had concluded, based upon investigation, that Morton was the robber, based on the clothing description . Again, the defense objected on the "ultimate issue" and the judge admonished the jury to disregard that testimony. The Court agreed that "in general, a witness's opinion that a defendant is guilty is not admissible at trial."[32] The Court agreed, however, that Officer Slone's comments were simply cumulative, as the clerk testified to the same thing. Further, the Court assumed that the jury would follow the admonition.[33] The Court agreed the error, if any, was harmless.

The court did agree, however, that he should have received a directed verdict on the Retaliating charge, as the facts clearly did not apply to that offense.

TRIAL PROCEDURE / EVIDENCE – JURISDICTION

Gibson v. Com., 2013 2120309 (Ky. App. 2013)

FACTS: On October 31, 2009, Georgetown PD responded to a complaint of a wrong-way driver on I-75. A responding officer found a parked vehicle matching the description, with the driver standing outside. As he pulled up, the driver got into the vehicle and drove off. The officer followed the vehicle, which repeatedly crossed the centerline and nearly struck a police vehicle, as it went from Scott County into Bourbon County, and eventually entered Paris. It struck an SUV occupied by an adult and four children; two of the occupants of that vehicle needed medical attention.

Gibson, the driver, was charged in Scott County with a variety of traffic offenses. The Court bound over most to the grand jury, but noted that the Speeding charge and two of the Wanton Endangerment charges occurred in Bourbon County, outside its jurisdiction. Gibson was indicted in Scott County on all but one of the offenses charged there. He took an Alford plea to Fleeing and Evading and DUI, with the remaining charges being dismissed. Three months later, in July, 2010, he was paroled.

On May 1, 2011, a Bourbon County grand jury indicted him for 5 counts of Wanton Endangerment related to the crash. Gibson argued that his Scott County plea prevented it, but the Court concluded the two events were distinct. Gibson took a conditional plea and appealed.

ISSUE: May charges be brought in two counties (for conduct that occurred in each county) in the same "course of conduct?"

HOLDING: Yes

DISCUSSION: The Court looked to KRS 452.550, under which Gibson argued all of the offenses associated with the chase should have been brought in the Scott County prosecution. The Court, however, agreed that the Bourbon County charges were

[32] Nugent v. Com., 639 S.W.2d 763 (Ky. 1982).
[33] Johnson v. Com., 105 S.W.3d 430 (Ky. 2006).

distinct from the continuous course of conduct. The Court looked to Hash v. Com. in which it noted that wanton endangerment 'is not a statute designed to punish a continuous course of conduct."[34] The Wanton Endangerment conduct occurred solely in Bourbon County and could only be prosecuted there. The Court found nothing in the plea agreement that constituted an agreement not to prosecute in Bourbon County.

Gibson's plea was upheld.

TRIAL PROCEDURE / EVIDENCE – CHARACTER

Com. v Watts, 2013 WL 2257609 (Ky. App. 2013)

FACTS: Watts allegedly stole $170,000 from her employer, the People's Bank of Madison County. The Commonwealth wanted to present evidence that the money was taken to support a drug habit and gave notice as required under KRE 404(c). The Court heard the witnesses, but concluded that their testimony would not be admissible, because the prejudicial effect outweighed its relevance. The Commonwealth appealed.

ISSUE: Is proof of motive (that a theft was related to a drug habit) permitted?

HOLDING: Yes

DISCUSSION: The Court discussed the admission of character evidence, which is admissible to prove motive.[35] The Court agreed that the evidence was relevant as proof of her need for money to support a drug habit. However, it also agreed that testimony may be excluded, even if relevant, if unduly prejudicial. But, the Court continued, evidence that Watts was in possession of "wrapped bank bills" – without reference to the drugs – is "directly relevant to the charged crime and does not run the risk of confusing the jury." The Court agreed that testimony as to her possession of the cash, excluding any testimony "regarding the context in which the bills were seen, Watts' drug use, or her financial inability to support her habit:" should be admitted

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Com. v. Goodman / Brown, 2013 WL 1919551 (Ky. App. 2013)

FACTS: On March 7, 2011, Officer Steele arrested Brown, in Lexington, for DUI. The officer seized oxycodone and clonazepam (Klonopin) from her purse. Both bottles with significantly few tablets than would be expected from when the prescription was filled. A blood test indicated the presence of oxycodone and sertraline (Zoloft), but she was not tested for clonazepam. She moved for dismissal, arguing that she was

[34] 883 S.W.2d 892 (Ky. App. 1994).
[35] KRE 404(b)(1)

sleeping in her car at the time, not operating it, and that the only substance in her blood was something for which she had a valid prescription.

The District Court ruled that evidence of a drug for which she had a prescription was inadmissible. The trial court ruled that the statute in question did not provide guidance for what to do in such cases and dismissed the charge. The Commonwealth filed a Writ of Prohibition, which was denied. The Commonwealth appealed.

ISSUE: Is a writ of prohibition the correct course when Double Jeopardy might prevent a retrial in a case?

HOLDING: Yes

DISCUSSION: The Court agreed that a Writ of Prohibition was the correct course in this instance since the Double Jeopardy clause prevents any other adequate remedy through appeal. The Court approved the Writ and remanded the Case to the Circuit Court for furthering proceedings.

Kiper v. Com., 399 S.W.3d 736 (Ky. 2013)

FACTS: In November, 2009, Burton was riding as a passenger with his mother, Saylor. Keyvin, Burton's nephew, age 1, was in the back seat. As they pulled up in front of Keyvin's mother's home, Kiper pulled up and fired multiple times, striking Burton 7 times. Saylor was also shot and permanently paralyzed. Burton named Kiper as the assailant.

Kiper was charged with Murder-Attempt, Assault 1st and Wanton Endangerment. He was convicted of Attempted Murder and Assault 1st, for shooting Burton and Assault 1st for shooting Saylor, along with related charges. He appealed.

ISSUE: Do charges of both Assault 1st and Attempted Murder implicate Double Jeopardy?

HOLDING: Yes

DISCUSSION: Kiper argued that it was Double Jeopardy to be convicted for both Attempted Murder and Assault 1st for the Burton shooting. Burton claimed that Assault 1st is a lesser-included offense of Attempted Murder. The Commonwealth argued that it did not violate the Blockburger rule.[36] The Court agreed that in fact, convictions for both charges do not violate Blockburger, but noted that under KRS 505.020(1)(b), a conviction for more than one offense is prohibited when "inconsistent findings of fact are required to establish the commission of the offenses." With respect to these two offenses, Attempted Murder, requires that the assailant must be proven to have "specifically intended during the attack to kill the victim." However, to prove Assault 1st,

[36] Blockburger v. U.S., 284 U.S. 299 (1932).

it must be shown that the "specific intent was not to kill, but merely to cause serious physical injury to the victim."[37]

Further, the Court noted that Kiper was shooting rapidly at Burton, without time to reflect between the shots, which negated the idea that some shots were intended to wound while others were intended to kill. However, the Court noted, the proper remedy for such an error is to vacate the lesser conviction, in this case, the Assault 1st. However, Kiper's sentence of 70 years was unaffected.

Burnett v. Com., 2013 WL 2296199 (Ky. 2013)

FACTS: On March 3, 2011, Burnett, who'd previously had a relationship with Peterson, took her at gunpoint from her Todd County apartment. He directed her to drive into a nearby cornfield. She was able to convince him to release her, however, and he tossed the gun out the window. On the way to surrender himself, still driven by Peterson, they were pulled over and Burnett arrested.

Burnett was charged with Kidnapping, Stalking, Wanton Endangerment, and Possession of a Firearm by a convicted felon. He was convicted and appealed.

ISSUE: Are Stalking and Kidnapping Double Jeopardy**?**

HOLDING: No

DISCUSSION: Burnett argued that his various convictions violated the Double Jeopardy clause. The Court looked to the Stalking and Kidnapping charge under the Blockburger analysis, and reviewed the elements of each. The Court ruled that the two convictions did not implicate double jeopardy. With respect to Kidnapping and Wanton Endangerment, again, they did not pass the Blockburger test. Looking to the remainder of the analysis, as indicated by KRS 505.020(1)(b), the Court did not find that there were inconsistent findings by virtue of the different states of mind required by the offenses.

Burnett's convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD

Hughes v. Com., 2013 WL 1349594 (Ky. App. 2013)

FACTS: Over November 7-9, 2008, Hughes "met and engaged in a sexual relationship with C.H., who was" 12. Hughes was 19. Just prior to her 13th birthday, C.H. gave birth. When DNA testing proved Hughes to be the father, he was charged with Rape 2nd. At trial, C.H. admitted she told Hughes she was 16 and evidence suggested her mother did as well. Hughes testified that he thought she was 16, raising

[37] KRS 508.010.

the defense in KRS 5210.030. A photo of C.H., taken when the baby was born, was shown to the jury.

Hughes was convicted and appealed.

ISSUE: May evidence of a rape victim's other sexual partners be introduced?

HOLDING: No

DISCUSSION: Hughes argued that he should have been allowed to introduce evidence of a police detective that indicated that "during his interview with another young man," C.H. had also indicated she was 16. He sought to impeach C.H.'s testimony that "she had not told anyone other than Hughes that she was" 16. The Commonwealth argued that would violate KRE 412, "which bars testimony concerning a victim's prior sexual activity." (The statement was taken because the other young man had been named as the putative father.) The Court agreed, however, that introducing it could result in the jury believing that she was promiscuous – "the very result that is forbidden by the statute."

Further, the Court noted, other witnesses had testified to the same fact, and what was at issue was only Hughes' belief as to her age. He objected to the introduction of the photo, arguing that she was not wearing makeup, but the Court noted that the photo was taken 9 months after their encounter, at the time of the birth, and could only benefit him, not hurt him.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Barefield v. Com. 2013 WL 2450529 (Ky. App. 2013)

FACTS: Barefield and Smith had lived together. On June 30, 2010, they began to argue about Barefield having an affair and he left her apartment. He came back shortly after midnight and became angry when she would not let him in. She finally agreed to do so. He entered and began to assault her. Smith was able to call 911 and got an answer, but apparently could not actually summon help. Barefield destroyed the phone and raped her. Smith went to a payphone and called police after he left.

Barefield was indicted for Rape 1st, Assault 2nd, Intimidating a Wwitness (for the destruction of the phone) and related charges. Barefield admitted to some of his actions, but denied cutting/stabbing her or raping her. He was acquitted of the rape, but was convicted of Assault 4th, Intimidating and Wanton Endangerment. He appealed.

ISSUE: Is a DNA test an admission of prior bad acts?

HOLDING: No

DISCUSSION: During his initial interrogation, Barefield refused a DNA test. He stated that he had not had sex with Smith that day, but that he knew that it might implicate him in other crimes. DNA was later obtained by a court order. Barefield argued that the statements, "which referenced prior uncharged criminal acts to which DNA testing might connect him, were inadmissible prior bad acts under KRE 404(b)." Since any prior crimes would be unconnected to the one at bar, the Court agreed the information "must have been offered solely to impugn his character and show his propensity to commit crimes." The Court further agreed that the statements were not harmless as the allegations came down to which of the two would be believed. As such, that conviction must be reversed.

The Court also looked at the Intimidating charge. The Court looked to KRS 524.010 and determined that to be a participant, required "more action than just reporting a crime, seeking assistance from the police or attempting to initiate a police investigation." Further, calling 911 does not initiate the legal process. At the least, the Court agreed, it required filing paperwork to that effect.

The Court reversed that conviction as well.

EXPUNGEMENT

Doyle v. Com. 2013 WL 1919559 (Ky. App. 2013)

FACTS: Doyle was charged with Theft in Mercer County. As the amount in question was over $2,000, the case was presented to the grand jury, which returned a "no true bill." She moved for expungement. The case was referred to the Circuit Court, which denied the motion. Doyle appealed.

ISSUE: Is expungement discretionary?

HOLDING: Yes

DISCUSSION: The Court noted that KRS 431.076(1) does not permit a case which has been dismissed without prejudice to be expunged. However, under Com. v. Holloway, a court is permitted to expunge records "under certain extraordinary circumstances" and listed several examples. Doyle did not argue any of the circumstances applied but contended that Holloway also permits a "case by case" approach in which the court looks to the "specific facts of a case."

The Court did not disagree, but ruled that such decisions are discretionary and solely within the purview of the trial court judge. The Mercer County Circuit Court decision was affirmed.

CIVIL LIABILITY

Robinson / Dickinson v. Officer Meece / Louisville Metro PD, 2013 WL 1352073 (Ky. App. 2013)

FACTS: Robinson and Dickinson were arrested on August 28, 2006, on a variety of charges. They pled guilty to possession of a firearm by a convicted felon and tampering with physical evidence. About 3 ½ years later, they sued Officer Meece and the LMPD on claims of excessive force, false imprisonment and related issues. Meece filed a motion to dismiss based upon a statute of limitations and a bar due to their convictions. Metro Louisville also claimed sovereign immunity. All claims were dismissed and they appealed.

ISSUE: Is one-year the statute for most common law torts?

HOLDING: Yes

DISCUSSION: Robinson and Dickinson argued that their claims were set forth under KRS Chapter 344 (The Kentucky Civil Rights Act) and the tort of outrageous conduct, both of which have a five-year statute of limitations under KRS 413.120. The Court agreed that five years was correct for such claims, but that neither was the correct cause of action based upon the alleged facts. The facts pled, however, only supported such common law torts as assault, false imprisonment and malicious prosecution, all of which were covered by the one-year statute of limitations. The Court agreed that the complaint was time-barred and upheld the dismissal.

Hughes v. Haas and Clark County (IN) Sheriff's Office, 2013 WL 1776021 (Ky. App. 2013)

FACTS: In 2009, Hughes and Haas both worked for Louisville Metro Corrections. Haas was also a volunteer special deputy for the Clark County Indiana Sheriff's Office, where he was on-call as a member of the SWAT team. On March 20, both attended a mandatory training session for Metro conducted in Clark County, Haas was an instructor and Hughes a trainee. Haas fired a blank shotgun cartridge and Hughes, nearby, suffered permanent hearing loss.

Hughes filed suit against Haas, in his capacity as an agent for the Sheriff, and also sued the Sheriff's Office, claiming negligence, breach of contract and premises liability. Ultimately the claims were dismissed and Hughes appealed.

ISSUE: Does worker's compensation take precedence in a lawsuit involving an employee injury?

HOLDING: Yes

DISCUSION: The Sheriff's Office argued that since nothing had occurred in the case in Kentucky, a lawsuit in Kentucky was not valid. Specifically, Metro had a contract to use

the facilities, only, with Metro providing the instructors and the equipment. Since nothing was supplied within Kentucky, Kentucky lacked any jurisdiction under the long-arm statute.

With respect to Hughes, the Court found no evidence that "Haas was acting as anything other than a Metro employee" at the time Hughes was injured. He was not acting as an agent of the Sheriff at that time. As such, KRS 342.690 was controlling, and that prohibited an employee from suing another employee for a work-related injury.

The Court upheld the dismissal of the claims.

SIXTH CIRCUIT'

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Rose, 714 F.3d 362 (6th Cir. 2013)

FACTS: In November, 2008, Rose came under investigation by Cincinnati PD for sexual abuse of three minors. The minors reported that Rose had "molested and/or raped them and that he had shown them pornographic images on a computer in his bedroom." The officers obtained a search warrant for his home and computer. Although the front page of the warrant indicated the address to be searched, including a description and photo, nowhere in the actual affidavit was the address repeated. The warrant was signed and executed. They seized a laptop that had numerous images of child pornography, some depicting Rose himself.

Rose was indicted for possession of child pornography. He was denied all suppression motions, took a conditional guilty plea and appealed.

ISSUE: Must a search warrant make a direct link between the address on the warrant and the crime being investigated?

HOLDING: Yes

DISCUSSION: The Court noted that "although the search warrant provided a description of the property that tenuously linked the property to Rose by explaining that the name 'Rose' appeared over the doorbell of apartment number one, the affidavit did not provide a link between the property and Rose." It simply stated that the "victims testified that criminal activity took place in Rose's bedroom and nothing more." It noted that although it "undoubtedly links Rose, and Rose's bedroom, to evidence of criminal activity, it failed to link Rose to 709 Elberon Ave., and as such, it does nothing to establish the required nexus between the place to be searched and the evidence sought."

Being "bound by the four corners of the affidavit," the Court could "not consider what the officer executing the warrant knew or believed." However, the Court did agreed that under U.S. v. Leon, the officers did obtain and execute the warrant in good faith. The "facts in this case do not raise fears of police misconduct," but instead, only "concerns about sloppiness in drafting affidavits within the Cincinnati Police Department."

Although ruling that the warrant was legally insufficient, it upheld the plea under Leon.

U.S. v. Hodge, 714 F.3d 380 (6th Cir. 2013)

FACTS: On October 18, 2010, Deputy Gault (Calhoun County, MI, SO) received word from Banks of "illegal activity occurring in Hodge's Battle Creek residence." Banks explained he'd seen "methamphetamine manufacturing, several firearms and a bomb" two days before. He relayed the tip to Det. Gandy who "immediately set to work corroborating Banks's story." He learned that Hodge had been buying pseudoephedrine locally and confirmed Hodge's identity and residence. He learned that the SO and Battle Creek PD both had been investigating Hodge and Freeze for manufacturing methamphetamine and found two anonymous tips to that effect as well.

Det. Gandy obtained a warrant for the lab and weapons, but did not mention the bomb. (He admitted he thought he had stronger evidence for the lab and also thought the description of "any and all firearms, ammunition and weapons" covered a pipe bomb.

Because of the guns, they determined that Battle Creek's Emergency Response Team would do the initial entry and that the Sheriff's Office would then do the actual search. They arrived, knocked and then breached the door with a ram. Hodge appeared, brandishing a screwdriver, which he subsequently dropped. However, he screamed and balled his fists as he was subdued and secured.[38]

Before the ERT teams reentered, "Gandy asked Hodge, without first giving Miranda warnings, 'if there is anything in the house that could get anyone there hurt, any active meth labs, meth waste, bombs, anything like [that] at all.'" Hodge said no. He denied a second specific question about a bomb. The ERT began a sweep for methamphetamine gases. A minute or two later, Hodge blurted out that there was a bomb in the house. Upon being pressed, he explained where it would be found. Robinson, with the ERT, asked additional detailed questions about the bomb and then entered and located it. Det. Pierce, a bomb expert, arrived and neutralized it. During the subsequent search, Gandy found no methamphetamine lab, but did find marijuana, prescription drugs, drug paraphernalia and a rifle.

Hodge was charged with the bomb, as well as possessing a firearm while be an unlawful user of a controlled substance.[39] Hodge moved for suppression, arguing the information about the bomb was obtained as an unwarned statement. The court denied the motion and he took a conditional plea . He then appealed.

[38] No easy task, as he was 6'6 and weighed 320.
[39] 26 U.S.C. 5861; 18 U.S.C. 922(g).

ISSUE: Is corroboration required when an informant is named/known?

HOLDING: No

DISCUSSION: Hodge argued first that the search warrant was insufficient. The Court noted that "statements from a source named in a warrant application, such as Banks, are generally sufficient to establish probable cause without further corroboration because the legal consequences of lying to law enforcement officials tend to ensure reliability."[40] In such situations, independent corroboration is not required, however.[41] Even so, Gandy did a great deal of investigation and the Court agreed the warrant was sufficient.

With respect to the bomb, the Court agreed that the statement was proper under Miranda (although the facts do not indicate he was actually given the warnings) or more importantly, under New York v. Quarles[42], the public safety exception. Although previous Quarles cases focused on guns, the Court noted that the "critical inquiry" is whether officers "have a reasonable belief based on articulable facts that they are in danger." Bombs are, of course, "potentially unstable and may cause damage if ignored or improperly handled by the police," making them more, not less, dangerous than guns. The questions asked about the bomb were focused on the construction and stability of the bomb. The Court upheld the statements under Quarles.

Further, the Court agreed that even absent the questions, the bomb would have inevitably been discovered while executing the warrant. The bomb "sat in a visually prominent area of [the] home and was conspicuously covered in a towel." The officers were looking for small items and could justifiably have searched where the items was located.

Hodge's plea was upheld.

U.S. v. Buffer, 2013 WL 3185585 (6th Cir. 2013)

FACTS: Prior to September 24, 2009, Memphis PD received a complaint, possibly an anonymous tip, about drugs being sold from a specific address. On that day, Officer Edwards did surveillance on the location and observed several short visits. Butler was apparently inside at the time. Edwards, an experienced drug investigator, believed that the short visits "were consistent with drug transactions." He stopped one vehicle that was leaving for a traffic violation and recovered marijuana from an individual he'd observed making a buy.

Edwards sought a search warrant, which was signed. It was executed on September 28 and three loaded handguns, a sawed-off shotgun, marijuana, packaging materials

[40] U.S. v. Miller, 314 F.3d 265 (6th Cir. 2002).
[41] U.S. v. McCraven, 401 F.3d 693 (6th Cir. 2005).
[42] 467 U.S. 649 (1984).

and over $5,000 in cash was seized. Butler was charged with being a felon in possession of a firearm, along with a separate charge for the shotgun, along with drug charges. He admitted to possessing one of the guns, but moved to suppress the rest of the evidence. He took a conditional guilty plea and appealed.

ISSUE: Must an anonymous tip be adequately corroborated?

HOLDING: Yes

DISCUSSION: In this case, the initial tip was assumed to be anonymous, and so "no information exists as to the informant's reliability," but the Court agreed that probable cause could still exist with corroboration.[43] The court agreed that Edwards' surveillance of the home was some corroboration. However, the Court agreed that "the discovery of the marijuana, even when taken together with the short visits and anonymous tip, did not create a substantial basis for determining that probable cause existed to search" Butler's home. The Court found "no clear nexus" between the two, noting that the individual may have possessed the marijuana before arriving at the location. (The subject did not admit to having purchased it that day.)

However, even if the warrant was "insufficiently corroborated," it might still be upheld under U.S. v. Leon.[44] However, in this case, the "only definite connection [the warrant] draws between an illegal activity – drug trafficking – and the place to be search – the Residence – is an anonymous tipster's allegation that 'drugs were being sold' there." As such more corroboration was required to bolster that "inchoate connection." Here, the details failed to do so. "Taken with only an unadorned tip, the requisite connection never materialized."

The court reversed the order that denied the motion to suppress and remanded the case.

U.S. v. Brown, 715 F.3d 985 (6th Cir. 2013)

FACTS: A CI told police that "he had seen cocaine and what he considered to be drug dealing" at Brown's Michigan home. An officer drafted a search warrant affidavit with that information, and it was signed. During the search, officers found cocaine, a pistol and $4,700 in cash.

He was charged with trafficking and possession of the weapon in the commission of a crime. He moved for suppression and was denied. He was subsequently convicted and appealed.

ISSUE: Must a CI be shown to be reliable in a warrant?

HOLDING: Yes

[43] U.S. v. Brooks, 594 F.3d 488 (6th Cir. 2010).
[44] 468 U.S. 897 (1984).

DISCUSSION: Brown argued that the submitted affidavit did not provide probable cause for the search. Specifically, he stated that the affidavit "did not establish probable cause because it did not describe sufficiently the basis for the conclusion that the [CI] was reliable." In the affidavit, the officer detailed that the CI had been used by the narcotics enforcement team in "numerous other investigations" and had provided reliable information in drug cases. The Court agreed the officer might have provided more specifics about what type of information he had provided but found that "level of specificity is not necessary." The same objection was made to the officer's identification of two cases he'd been involved with the CI, and the Court returned with the same decision. All that is required is that the CI be identified as having "given accurate information in the past to qualify as reliable." Although he did not include all of the details he corroborated, the court did not require that – that it was enough when the officer personally knew the informant to simply state that to be the case.

Brown also argued he was entitled to a Franks hearing, because the officer made an error in typing up the affidavit. (He indicated someone was present that was not.) However, as there was no indication that the allegedly false statement made any difference in the determination, nor was it done "knowingly and intentionally or with reckless disregard for the truth."

The Court affirmed is conviction.

U.S. v. Saffell, 2013 WL 1777146 (6th Cir. 2013)

FACTS: In October, 2005, McGarry, a regular informant, told the police that Safell had told him he had met a 12-year-old girl on the Internet and that he had recorded himself having sex with the girl. (Safell contended he was gay, however.) He began to record conversations with Saffell, in which they discussed "the arrangement of an underage sexual partner for Saffell." Saffell, however, later contended that McGarry "initiated an aggressive and persistent crusade to entrap Saffell …." During the conversations, Saffell indicated an interest in McGarry. " Once McGarry came to terms with Saffell's being more interested in men," they discussed a meeting with the fictitious "Tad." He was told Tad was 18 and agreed to a meeting.

However, there, he was arrested by Det. Allar. The detective then prepared a search warrant, as follows, for Saffell's home.

> On 10/25/05 at around 4:30 P.M. I was contacted by . . . McGarry . . . regarding Matthew Saffell. [McGarry] has given me information in the past of various criminal acts that have always proven to be truthful and reliable. McGarry advised me that he was offered a ride home by . . . Saffell. McGarry stated that Saffell offered him money to engage in sexual acts with McGarry's girlfriend if Saffell could watch. Saffell advised McGarry that he was a sexual pervert and had met a 12 year old girl. I supplied McGarry with a digital recorder .

> . . . I have listened to these recording[s] and the recording[s include] Saffell [talking to] McGarry about purchasing a young girl to pull a train on. "To pull a train" is slang for having sexual intercourse with several partners in a line one after another. Another recorded conversation has Saffell telling McGarry about the girl he had sex with a couple days ago. Saffell also asks McGarry to engage in sexual activity for twenty dollars. McGarry eventually agrees to tell Saffell about his past sexual encounters as Saffell masturbated in front of McGarry. McGarry stated that Saffell had a bag of sex toys and removed a bottle of lubricant and applied it to his penis while he masturbated. Saffell advised McGarry that he has in his resident [sic] pornographic materials that would blow a normal person[']s mind. This statement enforces McGarry[']s statement to me that Saffell had advised McGarry that he makes pornographic movies with minors.
>
> McGarry has been in constant contact with me since 10/25/2005. . . Saffell wants McGarry to find a young boy and girl he could have sex with. Saffell offers to pay McGarry and the young boy for the sex. McGarry advised Saffell that he knew a 13 year old boy and a 12 year old girl who [were] interested. Saffell stated that he would pay fifty dollars for a sexual encounter. The encounter was set up and Saffell was arrested at the meeting place on this date, 11/21/2005. Due to the above statements I believe that Matthew [Saffell's] residence contains pornographic materials depicting children engaged in sexual acts.

It further noted that the detective:

> "believes and has good cause to believe that said property . . . is concealed in 105 Morristown Street . . . being the residence of Matthew Saffell, being a [g]rayish colored single story house with white trim, and a white door facing Morristown Street."

A number of tapes were found, containing legal pornography. However, on the computer hard drive, they found suspected child pornography.

Saffell was charged, but the case was dismissed, under state law. Some five years later, he was indicted under federal law.[45] Safeell moved for suppression, and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must a clear connection be made between an address and the crime in a warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court agreed that the affidavit was "sufficient to establish a connection between Saffell and the premises to be searched." The court noted that the informant had identified that he and Saffell had discussed pornography that he had at

[45] 18 U.S.C. 2252 (1)(4)(B).

his home. Further, it was specifically discussed that he'd made a recording of a sexual encounter with an underage female, and it was logical to believe he had additional child pornography as well. The lack of a time frame mentioned as to when this occurred was not dispositive and did not render it stale.[46]

Further, although some information known to Saffell was not included in the affidavit, the Court did not find the omission to be deliberate or reckless.

Saffell's plea was affirmed.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

U.S. v. Conner, 2013 WL 1490109 (6th Circ. 2013)

FACTS: Deputy Pemwell (Franklin County, OH, SO), a member of the Crimes Against Children Task Force, used LimeWire, a peer-to-peer file sharing system, regularly to locate subjects sharing child pornography. On September 12, 2010, he identified a computer connected to LimeWire that was making hundreds of files bearing filenames indicating they were child pornography available for others to access and download. He downloaded a few and confirmed they were child pornography. He obtained a subpoena for the IP address and GUID to the ISP that issued that IP address. He was provided with a name (Bobby Lawwell) and an address. Deputy Pemwell accessed the files a second time and then obtained a search warrant.

On November 5, they executed the warrant. Lawwell stated that Conner, her uncle, lived in the garage apartment. (Lawwell lived in the house with her children.) They did a sweep, with consent, and observed a desktop computer and monitor. The deputies obtained a second warrant for the apartment as they were concerned that the first would not be sufficient. (Deputies stayed at the location while awaiting the warrant.)

The deputies seized the computer and numerous CDs, which would later be shown to contain child pornography. The day before the warrant was executed, Conner had reinstalled the operating system and confined the child pornography files to unallocated space. Such space would be inaccessible to the routine user, but could be accessed with advanced forensic tools. They confirmed that the file paths of many of the images indicated that they were downloaded from LimeWire and were stored in folders that other LimeWire users could access. The GUID of the version of LimeWire installed matched the one from which he downloaded the images. Further investigation led them to another search warrant, which they used to seize VHS tapes in the apartment that showed a pornographic video of Conner's young daughter.

Conner was charged with receiving and possession child pornography under federal law. He moved for suppression, arguing that Pemwell's use of LimeWire was an

[46] U.S. v. Frechette, 583 F.3d 374 (6th Cir. 2009); U.S. v. Brooks, 594 F.3d 488 (6th Cir. 2010).

unlawful, warrantless search. Conner's motion was denied and he was convicted at trial. He then appealed.

ISSUE: Is there an expectation of privacy in LimeWire?

HOLDING: No

DISCUSSION; Conner argued that he had a legitimate expectation of privacy in what he made available for LimeWire sharing. Generally, he would have an expectation of privacy in what he had on his home computer.[47] The Court agreed, however, that the privacy provided by U.S. v. Warshak[48] did not apply when peer-to-peer file sharing is involved. While third parties are accessing the computer, they are not doing so an intermediaries (such as an ISP) but as the intended recipients of files. "Public exposure of information in this manner defeats and objectively reasonable expectation of privacy under the Fourth Amendment."[49] His efforts to segregate and/or keep the files private did not establish that he was unaware that they files were otherwise at risk of being discovered. They were readily available to the public for a significant period of time, as evidenced by Pemwell doing so twice, and the "sheer number" available indicated he well understood how LimeWire worked.

The Court upheld his conviction.

SEARCH & SEIZURE - CONSENT

U.S. v. Thurman, 2013 WL 1924789 (6th Cir. 2013)

FACTS: On August 15, 2010, at about 3:30 a.m., Thurman as driving home from work. Officer Hendrickson (Fairlawn, OH, PD) saw him speeding without a functioning headlight or illuminated license plate, and made a stop. As he was checking Thurman's OL, a call came out about a nearby robbery, and the officer reported he has a suspect stopped that met the description of the robber. Officers Hendrickson and Honaker asked for, and received, consent to search the car. They had Thurman get out, frisked him, and sat him down on the guardrail. He was not handcuffed. They found two baggies of marijuana in the center console and Thurman stated he'd taken them from a patron at the bar when he worked as a bouncer and had planned to turn them in. He handed over the keys to the locked glove box when he was asked about it. By this time, about 9 cars were on the scene. He had not been given any Miranda warnings, but it was agreed he was not free to leave. A firearm was found in the glovebox. Thurman, a convicted felon, was charged with possession of the weapon. He moved for suppression and was convicted. He then appealed.

ISSUE: Is handing over keys while in custody voluntary?

[47] Guest v.
[48] 631 F.3d 266 (6th Cir. 2010)
[49] Katz v. U.S., 389 U.S. 347 (1967).

HOLDING: Yes (it can be)

DISCUSSION: Thurman argued that the officers did not ask for, nor did he give, consent for the search, and that they simply took his keys. The Court agreed that simply having someone detained is not enough to make a consent invalid Instead, all that is required is that the consent be voluntarily. In this case, although there were quite a few officers present, none were holding Thurman at gunpoint. The Court agreed that his "handing over of the keys constituted a voluntary consent to search the glove box."

The Court upheld Thurman's conviction.

U.S. v. Frost, 2013 WL 1490102 (6th Cir. 2013)

FACTS: Memphis officers responded to a location close to Frost's home, in response to an emergency call. There they found Donnell Frost, Jr. (DJ), age 16, who told them that he and his father had physically fought when he left the house with his mother's cell phone. As he got away, he heard his father go into, and then come out of the house, and when he looked back, he saw his father coming after him with a gun. He fired one toward DJ. (Frost later said he was just trying to scare him.)

Officers went to Frost's home and immediately arrested him. They asked for consent to search first from DJ's mother, who denied it, saying the house belonged to Frost. They asked Frost for permission. He refused to sign a form but told them they could "search all that [they] want because he didn't have any firearms and he had fired no shots at anybody." Inside they found a 2-shot Derringer pistol which had been fired once, hidden in a bed.

Frost, a convicted felon, was indicted for possession of the weapon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May a subject in custody still give a voluntary consent?

HOLDING: Yes

DISCUSSION: Frost argued that his consent was not freely and voluntarily given, since "he was handcuffed and sitting in the back of a patrol car, after having been arrested." The trial court noted that he'd only been detained a brief time when asked, and that the officers had reholstered their weapons when they asked. The Court noted that several factors were involved in determining if a consent was voluntary – such as "the characteristics of the accused, including the age, intelligence, and education of the individual, whether the individual understands the right to refuse to consent; and whether the individual understands his or her constitutional rights." In addition, it must look at the "details of the detention, including the length and nature of detention; the use of coercive and punishing conduct by the police; and indications of 'more subtle forms of coercion that might flaw [an individual's] judgment.'"[50]

[50] U.S. v. Watson, 423 U.S. 411 (1976).

The Court reviewed factors with respect to Frost, finding that the only possible error was that the officers did not inform Frost that he could refuse consent. Although the court had "recognized that police officers are not constitutionally obligated to inform suspects of their right to refuse consent, we have also indicated that failure to do so should be considered when analyzing the voluntariness of a defendant's consent."[51] However, his refusal to sign a consent form suggested that he knew he had the right to refuse, and "moreover, was unafraid to exercise this right." His oral consent was different than the one given in Worley, in which the subject, when asked for consent, responded "You've got the badge, I guess you can."[52] Instead, he seemed to be trying to mislead the officers about what they might find.

Frost's plea was affirmed.

SEARCH AND SEIZURE - TERRY

U.S. v. Williams, 2013 WL 1831773 (6th Cir. 2013)

FACTS; On May 23, 2009, Sgt. Johnson (Memphis PD) was on patrol in a nightclub parking lot, as there had been a number of break-ins reported. Officer Amato was also in the area. Sgt. Johnson saw a vehicle backed into a space some 300 feet from the club's entrance, headlights on and engine running. Two occupants, Chalmers (driver) and Williams (passenger) were inside. Finding the location unusual, he pulled nearby, although later testimony differed as to whether the vehicle was blocked in. His alley lights were illuminating the vehicle. He approached the car with a flashlight.

Sgt. Johnson noticed that the occupants were "shuffling around" and "moving stuff" on the floorboard. He saw that both were "unkempt," unlike most of the club patrons. He asked what they were doing and shone his light inside. He saw DVD monitors and stereo equipment, with no boxes, at Williams' feet. He learned Chalmers had a suspended OL, expired plates that belonged to another vehicle and burglary tools in plain view.

Officer Amato arrived as backup and both men were secured in separate vehicle while they searched for evidence of recent car break ins. Officer Amato returned to find Williams moving in the back seat, and subsequently found a handgun on the floorboard. Ammunition fitting the weapon was found on Williams' person.

Williams, a convicted felon, was indicted for possession of the weapon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May officers detain someone briefly with reasonable suspicion?

[51] U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011).
[52]

HOLDING: Yes

DISCUSSION: The Court looked to whether the encounter, initially, was a seizure. It concluded this case fell "somewhere in the middle." On one hand, Sgt. Johnson's car did apparently leave room for Williams to drive past. But, "maneuvering around Sergeant Johnson's close-in squad car was the only way to leave the scene." They noted the ultimate question was whether Williams felt free to leave. The Court was convinced that the "encounter was more akin to an investigative detention than a run-of-the-mill conversation on a public street," citing the lights pointed at the pair, Sgt. Johnson's walking directly in front of the car, the use of a flashlight. "At this point, [the Court thought that] a reasonable person in the defendant's shoes, already hemmed into a parking space with a single narrow egress, would no longer feel free to terminate such an encounter." The Court concluded that Sgt. Johnson "seized Williams by a 'show of authority' when he began asking questions of the occupants in an already-coercive environment."

However, Sgt. Johnson had "ample reason for suspicion based on a number of converging factors." As such, the scope of the investigation "was reasonably related to the circumstances that justified the detention." The offices took prompt action to address their suspicions by "surveying the lot and talking to affected patrons." Nothing suggested that the detention "was improper or drawn-out beyond reason."

The Court upheld the denial of the motion to suppress and his plea.

U.S. v. Royal, 2013 WL 1777255 (6th Cir. 2013)

FACTS: In September 2009, weapons and ammunition were stolen from a Tennessee clinic. Before the burglary was reported, however, Morristown officer encountered Royal and Kelley. At about 5 a.m., Officer Sexton reported that he saw two men near car wash bays. He called for backup and Officer Campbell arrived quickly. Both officers were experienced.

The officers later testified that both men were wearing clothing "with what appeared to be insulation stuck to the outside, and with their hoods pulled over their heads." Neither had a vehicle at the car wash, both were "sweating profusely and were visibly nervous." They said they were just "walking around" but would not state where they'd been. Only Royal had ID. No warrants were found for either man. They asked if the men would consent to a pat-down search for weapons; both did. Officer Campbell found, on Royal, marijuana, a pocketknife, a screwdriver and a speed loader. The officers saw a vehicle parked in a church parking lot across the street, which was otherwise empty. Both men denied any connection to the car, which in fact belonged to Royal's mother. The men were detained in the back of a cruiser until Corporal Shockley arrived, moments later. They were not handcuffed nor under arrest. The Corporal gave each man Miranda warnings and spoke them briefly, separately. He noted that it was a warm night, but both were wearing long-sleeved clothing and were "sweating profusely." He also noted the unusual presence of the car where normally only church busses were placed

overnight. Upon approach, they saw that the windows were down and the keys in the ignition. The back seat was full of items, including mail, a guitar and a computer printer box. A shipping label on the box identified the clinic, some four miles away. They also saw mail addressed to Royal. Upon investigation, they found the clinic had been burglarized.

Royal and Kelley were arrested, and the vehicle towed to the police station. The contents were inventoried and the handgun was also found. Royal was charged and moved for and convicted, for possession of the gun, in federal court, because he was a convicted felon. He appealed.

ISSUE: May officers do a brief detention based on reasonable suspicion?

HOLDING: Yes

DISCUSSION: The District Court had concluded that the initial stop and frisk, and then the subsequent detention, was justified based upon what the officers knew and then located on the frisk. The Court agreed the items in the vehicle were in plain view, and the sighting of a box, with a shipping address of the clinic, was highly suspicious. The vehicle was properly towed and inventoried. The Court noted that the two men "disavowed any connection to the vehicle." Royal argued that the encounter was "an investigative detention from the moment the officers first pulled into the car wash and approached them." The court noted that an individual is seized when an officer "by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied."[53] Simply approaching someone in a public place and asking questions isn't enough[54] although the right words could make a reasonable person feel they weren't free to leave.[55] Although factors have been detailed in various caries, the "officer's subjective intent in detaining an individual is irrelevant unless that intent is conveyed to the individual in such a way as to cause him to believe he is not free to leave."[56] Nothing in the encounter seemed to lead to anything other than a voluntary encounter. The two men consented for the frisk for weapons, which even without consent, the Court agreed was justified under the facts.

The Court also addressed Royal's argument that Sgt. Herrera, who wasn't involved in the arrest, prepared documents that indicated the frisk was a "search incident to arrest." He did not testify, but the Court did chastise the preparation "as 'careless' and 'without due consideration of the legal phraseology he employed.'" Royal's conviction was affirmed.

U.S. v. Logan, 2013 WL 1924997 (6th Cir. 2013)

[53] Brendlin v. California, 551 U.S. 249 (2007).
[54] U.S. v. Drayton, 536 U.S. 194 (2002).
[55] U.S. v. Richardson, 385 F.3d 625 (6th Cir. 2004).
[56] U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007).

FACTS; On October 13, 2010, at about 10:30 p.m., Officer Boutell (Kalamazoo, Michigan) was patrolling. He spotted a vehicle with headlights off, but dome light on, and saw 4-5 people inside. He believed the vehicle was trespassing as it was parked in a vacant lot. He drove by without stopping and called for two other officers to back him up. All three officers believed the city owned the lot. In fact, the vehicle was parked on private property. They pulled in without lights to "gain a tactical advantage" and then shined their spotlights on the car to momentarily blind the occupants. They parked some distance away and were not blocking the vehicle in.

As they emerged, the officers saw Logan get out on the front passenger side. He was ordered back in at gunpoint and "Logan hesitated, unsure about what he wanted to do, and he "stutter stepped" back and forth." Officer Weldon believed "he was likely trying to distance himself from contraband in the car." Logan gave a false name. He gave consent to search his person and a bullet was found, causing him to be handcuffed. A warrant was discovered under his real name. Officer Boutell was dealing with Jones, who was "not fully cooperative." In light of Jones's behavior, Officer Boutell frisked him. An open bottled of gin was found in the console. Officer Boutell believed he could search the entire car, and did so, finding a loaded handgun which matched the ammunition Logan had.

Logan, a convicted felon, was charged with possession of the gun. He moved for suppression. The Court agreed that he encounter was a seizure, and that Logan was seized when he began to cooperate with the officers. The Court agreed that although they were mistaken about the ownership of the lot, it was reasonable under the circumstances, and justified even without that belief, as it was in close proximity to a cut through used as a "means of flight by people committing criminal acts in the adjoining neighborhood." The Court agreed that the bullet provided probable cause to search.

Logan took a conditional guilty plea and appealed.

ISSUE: Is flight sufficient for reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court noted that Logan was not immediately seized, because he did not immediately yield. Ultimately he was seized, however, when he complied with the order to get into the vehicle. The Court agreed that the brief seizure was appropriate based upon the facts as known by the officers at the time, and was supported by his brief flight, even though only a few steps, away from the vehicle. The Court agreed that the small amount of weight given to the fact that the area experienced high crime was proper, as it was, in fact, limited.

The Court agreed that although fleeing a scene is not "always an accurate predictor of guilt," it was enough to create reasonable suspicion of criminal activity.

The court upheld the stop and his conviction.

U.S. v. Figueredo-Diaz, 718 F.3d 568 (6th Cir. 2013)

FACTS: In November, 2009, Hoing, a Tennessee officer on special assignment with the DEA task force, received a tip from a CI. He was told that Rivas had purchased a one way ticket from Texas to Memphis. Other facts indicated that Rivas might be involved in drug trafficking. He went to the airport and called Rivas' number, and observed a man answer a phone. He hung up and began to follow Rivas, now that he'd been identified. He tracked Rivas to a restaurant and then approaching a tractor-trailer. Rivas climbed into the vehicle; Figueredo-Diaz was waiting in the passenger's seat. The truck was registered to Rivas. Rivas got out and waiting, another vehicle drove up, driving by Morales-Loya. Rivas got in and they drove away, followed by Figueredo-Diaz driving the truck. The officers followed, splitting up when the two vehicles split up, with the truck parking in a truck stop lot. Eventually they reconnected at a warehouse.

As the four men (the three identified and another who had joined them) "huddled around the rear of the trailer with its doors wide open," officers approached. Rivas and the unidentified men fled, while the other two were "detained without incident." A narcotics detection dog alerted, but no drugs were found. Hoing then deployed his own dog which gave a positive alert on the trailer. Remembering that Rivas inspected the underside of the truck earlier, he checked that area, finding 2,100 pounds of marijuana underneath. (Cash and other items were found inside the cab.)

Figueredo-Diaz and Morales-Loya (as well as Rivas) were charged with conspiracy to distribute. They moved for suppression, arguing that they were unlawfully detained. The Court suppressed the evidence for the two men. The Government appealed.

ISSUE: Is evidence found as a result of a legal search admissible against third parties?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers had reasonable suspicion to detail Rivas. As such, the government argued, even if the detention of the other two men was unlawful, "the suppression of the evidence was not warranted because it would have been discovered in the course of the agents' lawful detention of Rivas." The court agreed that the "defendants' detention was entirely superfluous so far as the discover of evidence is concerned." The dog sniff "was going to happen regardless" of whether the two men were present. The officers had the authority to detain the trailer and were justified in not allowing it to drive way.

The order to suppress was reversed.

SEARCH & SEIZURE – SWEEP

U.S. v. Holland and Persa, 2013 WL 2302380 (6th Cir. 2013)

FACTS: In January, 2011, a single person held up a Cleveland Subway restaurant. The robber was tracked to a nearby apartment, but no one answered there. The officers left. Investigation indicated the Holland and Persa lived at the apartment and two different officers returned later. They knocked loudly and threatened to get a warrant if the occupants didn't answer. Holland opened the door. They knew he was not the man on the surveillance tape, so they asked if anyone else was there. He denied it, but the officers "heard rustling in a nearby bedroom." They found Persa hiding there.

Upon investigation, they learned that Persa was involved in a number of unsolved bank robberies. Both were arrested. Holland gave consent to search the apartment. Both men were indicted for bank robbery.

Both men moved for suppression, arguing that the warrantless arrests violated the Fourth Amendment. The District Court ruled that under U.S. v. Talley the "officers were entitled to enter the bedroom by virtue of the "public-safety exception."[57]

When the motion was denied, both took a conditional guilty plea and appealed.

ISSUE: Is a sweep permitted when officers know there should be more than one occupant, and hear evidence of the presence of another person?

HOLDING: Yes

DISCUSSION: The Court noted that although there was no evidence Holland gave explicit consent, it was not coercive to threaten a warrant. Such a threat "does not necessarily invalidate consent," when there was sufficient probable cause to get a warrant. The court agreed that it was not error to find "that Holland gave the officers consent to enter without a warrant."

With respect to the sweep, the court noted that the officers knew that two men lived there prior to their arrival, and when they heard noises from another room, after being told no one was there, it was appropriate to do a "limited protective sweep for officer safety." (The court also noted that the alleged robber was armed.) The Court agreed that the sweep was proper under Maryland v. Buie.[58] The officer "articulated specific facts from which a reasonably prudent officer would have believed that the bedroom harbored an individual who might pose a danger to the officers on the scene." The court agreed that the sweep was proper.

The Court upheld both arrests.

SEARCH & SEIZURE – CARROLL

[57] 275 F.3d 560 (6th Cir. 2001)
[58] 494 U.S. 325 (1990), See also U.S. v. Taylor, 248 F.3d 506 (6th Cir. 2001),

U.S. v. Colbert, 2013 WL 1908902 (6th Cir. 2013)

FACTS: On October 25, 2010, Agent Wamsley (ATF) and Louisville Metro police officers did surveillance of Victory Park. Det. Nichols, of LMPD's street narcotics team, supervised. He regularly worked in that area, charactering it as an "open –air drug market."

Officers saw Colbert at the park around 5:00 p.m. He was approaching individuals and vehicles there, and would quickly return each time to his vehicle or a nearby picnic table. He approached 15 people within 30 minutes. They saw no actual transactions but believed his behavior was consistent with hand-to-hand trafficking.

They then watched him drive to a nearby residence a few blocks away. He entered and came out just a few minutes later. He was not carrying anything, but they believed he was using the house as a storage location. He returned to the park and engaged with another 10-15 persons. He repeated the pattern a third time.

At about 6:30 p.m., Nichols made a traffic stop of Colbert, for failing to use a turn signal. He tried to get out but was ordered back inside by Dets. Nichols and King. He was asked "if he had anything on him, anything in the vehicle." He said he did not. Det. Loudon called for a drug dog. Nichols had Colbert get out and frisked him, finding neither weapons or contraband. He had not warrants. Colbert denied a request for consent to search the vehicle. About 10-15 minutes later the dog arrived, but did not alert, as Colbert watched. Afterward, Nichols questioned Colbert as follows:

> Are you sure there's nothing in your vehicle? You just saw the K-9 drug dog run around your car. Do you have anything in your vehicle that you need to tell me about? [Colbert then] replied that there was a marijuana blunt in the backseat ….

Nichols searched the car, finding a baggie of marijuana on the back seat. The dog was directed to search inside and alerted on the pocket of a jacket that was in the open cargo compartment of the station wagon. The K-9 officer then saw a handgun under the jacket and seized it. Between 7:15 and 7:30, Colbert was arrested.

Colbert admitted to ATF agents that he owned the weapon, for which he was subsequently charged because he was a convicted felon. The officer obtained a search warrant for the residence he'd visited twice.

Colbert was charged and requested suppression. He was convicted for the firearm[59] and appealed.

ISSUE: Does an admission of drugs inside a vehicle justify a Carroll search?

HOLDING: Yes

[59] No drug charges are mentioned, but they may have been the subject of a separate state prosecution.

DISCUSSION: Colbert argued that the scope and duration of his detention after the initial traffic stop was too long. The Court noted that to continue to hold an individual, "the officer must have reasonable suspicion of additional criminal activity."[60] Colbert argued that even if they had reasonable suspicion at the outset, that suspicion was dispelled when the dog failed to alert, but the Court agreed that the suspicion originated, and continued, because of Colbert's own actions. Det. Nichols' actions toward Colbert were part of a continuous act over a limited period of time.

Colbert's conviction was affirmed.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Alexander, 2013 WL 2500587 (6th Cir. 2013)

FACTS: On October 8, 2010, Officers Saidler, Rice and Butler (Cincinnati PD) were investigating drug activity at a gas station. Saidler and Rice, in plainclothes, were parked close enough to observe any activity. They were in communication with Officer Butler, a block away, in uniform. On that day, they observed a vehicle parked at a gas pump, but not buying fuel. He engaged in what they believed to be two hand-to-hand transactions. They did not actually see any weapons, drugs or cash, however.

The driver, Alexander, drove off. Officer Saidler saw that the license plate light was out, and that was communicated to Officer Butler. Officer Butler made the stop and Officers Rice and Saidler were right behind him. Officer Rice called for a drug dog immediately. About 18 minutes later, Officer Fromhold arrived with a dog and within a few minutes, the dog alerted on the driver-side door. When the door was opened, the dog alerted on the center of the console. Crack cocaine was found during the search. Officer Saidler also searched the trunk, finding a digital scale and a loaded handgun. Alexander was arrested.

Alexander moved for suppression, arguing that the initial stop was unlawful. After two hearing, the court denied the motion. Alexander pled guilty to being a felon in possession and appealed.

ISSUE: Will knowledge known to one officer be imputed to other officers on the same team?

HOLDING: Yes

DISCUSSION: The Court agreed it was proper to impute any knowledge held by Officers Saidler and Rice to Officer Butler, as they were working as a team.[61] Further, there was no evidence that the two officers at the scene did not fully communicate the situation to Officer Butler and share their reasonable suspicion.

[60] See U.S. v. Everett, 601 F.3d 484 (6th Cir. 2010).
[61] U.S. v. Woods, 544 F.2d 242 (6th Cir. 1976).

Alexander also argued that his mother's testimony during the hearing, in which she indicated the light was working properly, showed that there was contradiction over the reason for the stop. However, the Court ruled that she could not say whether it was working that night because she was not present. (Others who allegedly could testify as to the light's status were not present at the hearing.) The Court agreed it was reasonable to give more credence to Officer Butler.

With respect to the wait on the drug dog, the Court agreed that the duration of the stop was "within the bounds of the Fourth Amendment." The dog's alert provided probable cause to search the entire vehicle, and that resulted in the discovery of the gun.

The Court upheld Alexander's plea.

U.S. v. Crawley and Allen, 2013 WL 1978007 (6th Cir. 2013)

FACTS: On January 4, 2010, Trooper Lilly (Virginia State Police) observed a vehicle pass him with an expired Virginia inspection sticker and no front place. He followed and saw it bore a Maryland rear plate; he knew that state also required front plates. He saw the vehicle exit at the last moment, at a location with no gas stations or easy reentry. The vehicle pulled into a pizza place, without signaling. The trooper pulled up and activated his lights. Allen opened the driver's side door and the trooper saw that the " car's electronic gauges appeared not to be working and that there was a screwdriver on the floor." Allen said they'd pulled off for gas and that the front plate was lost in a snowstorm. The trooper learned that Crawley was wanted in Georgia on a non-extradition warrant and had other arrests on record. So did Allen. Trooper Edwards arrived as backup. Trooper Lilly questioned them about their travel and they said they'd been fishing. Although there were poles in the car, the trooper "found this answer odd because it had been very cold and all of the lakes and most of the streams were frozen over. Moreover, neither defendant could produce a fishing license." When separated, their stories were similar but not quite consistent.

Crawley gave consent to search the inside of the car. Another trooper ran a dog around the vehicle but the dog did not alert. Other items found inside were also suspicious, including a hand-rolled marijuana cigarette, which Crawley said belonged to his father, who had glaucoma. They searched the trunk, finding $70,000 in cash and several firearms.

Both were arrested and moved for suppression. It was denied after the magistrate concluded the stop, and the detention, was justified. It further concluded that the evidence supported probable cause to search the vehicle. Both took a conditional guilty plea and appealed.

ISSUE: Does the presence of a joint, especially when coupled with other drug evidence, provide probable cause for a vehicle exception search?

HOLDING: Yes

DISCUSSION: The Court ruled that the initial stop was justified by the observed traffic violation. The Court agreed that "It is not inappropriate for an officer to check for valid identification and outstanding warrants while conducting a traffic stop.[62] After learning of the warrant, it was proper to call for, and wait for, backup. With the suspicious answers, it was proper to continuing the questioning. The Court agreed the time, 30 minutes, was long for a traffic stop, but was justified under the facts as given.[63] He also argued that the time on the citation indicated it was issued five minutes after the stop, but the court noted that was not really an issue.

With respect to the trunk search, the Court noted that the cigarette alone didn't create probable cause, that "a marijuana cigarette when coupled with other evidence of drug activity provides probable cause."[64]

The Court upheld the searches and the pleas.

SUSPECT IDENTIFICATION

U.S. v. Washington, 714 F.3d 962 (6th Cir. 2010)

FACTS: Between March 12 and March 14, 2010, three carjackings occurred in Michigan. Five months later, Nesbitt, the victim in the second carjacking, was asked to look at a photo array. He immediately identified Washington. He was charged with all three and immediately moved for suppression. When that was denied, he stood trial and was convicted. He then appealed.

ISSUE: Are slight variations in photos enough to invalidate a photo array?

HOLDING: No

DISCUSSION: Washington argued that the photo array was "impermissibly suggestive because although Nesbitt "described his attacker as having light brown skin, the police officers chose darker-skinned individuals than himself to appear in the photo array alongside him." The Court noted that the officer's care in selecting the photos was reflected by the photo array and the skin tone was very close. Although there was a glare on Washington's photo, the witness was cautioned about lighting and complexion. Other photos in the array show a similar glare.

The court agreed the identification process was proper and upheld his conviction.

42 U.S.C. §1983 – GIGLIO

Dawson v. Dorman, 2013 WL 2397410 (6th Cir. 2013)

[62] See U.S. v. Smith, 601 F.3d 530 (6th Cir. 2010).
[63] See U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005.
[64] U.S. v. Crumb, 287 F. App'x 511 (6th Cir. 2008).

FACTS: Dawson was a suspect in a robbery at gunpoint in Ludlow. He was charged with Robbery 1st. On the eve of trial, the indictment was dismissed after the prosecutor concluded "that the case was in trouble due to witness credibility issues." Dawson sued Dorman (the lead investigator), claiming false or misleading information that led to the arrest.

The District Court awarded summary judgment to the defendants and Dawson appealed.

ISSUE: May an officer's history of untruthfulness be used to determine their credibility?

HOLDING: Yes

DISCUSSION: Dawson claimed that Dorman "committed the constitutional tort of malicious prosecution by deliberating fabricating evidence to support the robbery charge."[65] Dorman testified incorrectly about where a fingerprint (that matched Dawson) was located in the crime scene. (It was on a soda can taken from his brother's home, not on the shoebox taken in the crime.) Dorman claimed to have mistakenly believed all the prints examined were taken from that one item, because he never personally looked at the fingerprint cards before they were sent to the lab. Dorman argued it was mere negligence that caused his false testimony. The District Court believed Dorman was more credible and awarded him summary judgment.

Although normally, the Court noted, evidence as to mental state is almost impossible to discover, the court noted that Dorman's history of dishonesty as an officer was long, and other cases had been affected because of that history. As such, the Court agreed there was some evidence supporting Dawson. However, it was not enough, as Dorman's error was not critical to the determination of probable cause.

The Court upheld the summary judgment motion.

42 U.S.C. §1983 – USE OF FORCE

Smith (Donnetta, Charles and Logan) v. Stoneburner and Knapp 716 F.3d 926 (6th Cir. 2013)

FACTS: After Charles Smith shoplifted a phone charger ($14.99), he was stopped by the manager. He admitted his crime but refused to stay at the store while the manager called the police. Instead, he walked home, within sight of the store. Officers Stoneburner and Knapp (Sturgis, MI, PD) responded. After talking to the store employees, they decided to talk to Charles.

[65] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010)

The found Logan (Charles's brother, age 19) outside. He told the officers that Charles was inside but when asked about the offices entering, he told the officers "that he would ask his mother and that they could wait on the back deck of the house while he checked." They followed him into the back door. Logan entered and Stoneburner went inside with him. Knapp stayed outside. Logan "retrieved Charles from his bedroom upstairs and brought his mother, Donnetta, down too." Charles agreed to step outside.

There, Charles denied having stolen the phone charge and allowed a frisk. Stoneburner found a lighter. "Undeterred, Stoneburner asked Charles if he could look inside the house," to which Charles returned only a mumble. He moved to go back inside and pulled the door behind him, Whereupon, "Stoneburner held the door open, told Charles to stop and crossed the threshold of the doorway to grab Charles by the wrist." He pulled him back outside. At some point, Donnetta told him not to touch Charles, and moved between them; Stoneburner then "collided with Donnetta, causing her to hit the side of the house."

Charles stiffened his body as he was bent over a deck railing, so each officer grabbed an arm, "pressed his head against the wall" and handcuffed him. Charles was charged with a misdemeanor theft and convicted.

All three of the Smiths filed suit under 42 U.S.C. §1983, claiming that Stoneburner illegally entered the home, twice, and used excessive force against Charles and Donnetta. The District Court denied the officers qualified immunity and granted summary judgment in Charles's favor on the issue of the second entry and arrest. The officers appealed.

ISSUE: Is a warrantless entry for a minor crime permitted, without an exigency?

HOLDING: No

DISCUSSION: The Court reviewed each of the incidents under the qualified immunity standard.

"First up is whether Officer Stoneburner violated the Smiths' Fourth Amendment rights when he followed Logan into the house to look for Charles. Police officers, it has long been true, may not enter a private home without a warrant absent an exigency or consent."[66] Stoneburner does not claim that he had a warrant when he entered the home, and he does not claim any exigency justified the entry. He instead leans on the consent exception.

The Court asked – "did Logan invite Stoneburner into the house?" "Maybe yes, maybe no." As there was dispute on the issue, the court continued "that is the epitome of a triable issue of fact" which had to go to a jury. The Court indicated that the "testimony shows two competing versions of what happened, only one of which can be true."

[66] Payton v. New York, 445 U.S. 573 (1980).

Second was whether Stoneburner violated the Fourth Amendment when he entered the second time to arrest Charles. There was no issue of consent in this situation.[67] Officer Stoneburner certainly had probable cause that Charles committed the crime, but there was no exigency requiring him to get inside immediately or to make a "warrantless entry to arrest Charles for this $14.99 crime." His entry was not "hot" in any sense of the word, nor was it a pursuit. He made no attempt to arrest Charles while he was outside and it was not illegal for a citizen not in custody to simply end a conversation and walk away. Had Stoneburner remained outside, Charles "would have remained inside the house, a non-violent person alone with a non-violent phone charger." Stoneburner could have simply sought a warrant. Certainly Charles could have destroyed the charger, "but to call this a public-safety exigency gives public safety a bad name." There was more than enough evidence even without the charger and had he tried to destroy it, he would have simply added evidence tampering to his list. After all, "how does one make a phone charger disappear without leaving the house?"

The Court continued:

> A sledgehammer would leave plenty of shards for the police to discover. Hiding the charger in the house was a possibility but hardly a sure thing. Tossing the charger out the window would have accomplished little. This was not Venice. It was canal-free Sturgis, Michigan. And flushing a charger down a toilet – or more precisely trying to flush a charger down a toilet – would be more likely to create new problems than eliminate the one at hand."

Once Charles decided not to cooperate, Stoneburner's investigation hit the point at which a warrant was required.

As to whether the rights were well established, the Court noted:

> By 2010, Payton and Welsh had been on the books for more than 25 years, making it clear that a double presumption guarded against warrantless entries into a home to arrest a misdemeanor suspect.

"Third up is whether Offices Stoneburner and Knapp used excessive force in arresting Charles and shoving Donnetta." The Court noted that "standard is easy to state and even easy to apply in this instance." It continued: "A police officer uses excessive force in arresting a suspect if his actions are objectively unreasonable given the nature of the crime and the risks posed by the suspect's actions."[68] Charles argued his head was banged against the wall several times and the Court agreed that "shoplifting of this sort offers no reason by itself for banging a suspect's head against a wall." There was some evidence that Charles was physically resisting, but he argued that he was trying to straighten his back so he could breathe. In any event, as a factual argument, the officers were not eligible for qualified immunity. Same for the issue of whether

[67] See also Welsh v. Wisconsin, 466 U.S. 740 (1984).
[68] Graham v. Connor, 490 U.S. 386 (1989).

allegedly tight handcuffs caused an injury, since the officers claimed they loosened the cuffs when he complained. As for Donnetta's claim, she claimed the officer intentionally shoved her, he claimed he "inadvertently bumped her." The Court noted that "it makes no different if it was a "gratuitous shove" or an "inadvertent bump" – either way, it "falls within the bailiwick of the jury."

The Court affirmed the District's Court's decisions.

Burdine v. Sandusky County, 2013 WL 1606906 (6th Cir. 2013)

FACTS: On August 11, 2007, at about 3:30 a.m., Fremont (OH) officers arrived at a fight call. Officer Daniels arrived first and saw Burdine, bearing injuries. He approached and Burdine (possibly intoxicated) "lunged and possibly swung at" him. Burdine was pepper sprayed and subdued. He passively resisted by not standing up to go to the car, so he was picked up. Officer Emrich arrived, recognized Burdine, and ordered that he be taken directly to the jail because he believed "Burdine would not cooperate with standard booking procedures." There, he refused to get out and was "forcibly removed and carried into the jail." He was taken to the shower room to be rinsed off, but when the handcuffs were removed, he "began making martial arts moves and appeared ready to punch the officers." He began to "violently swing his arms, kick and bite at the officers." Several officers moved in and tried to control him. Deputy Sgt. Myers drive-stunned him in the back of the leg, which appeared to have no effect. He did it again, on the lower back, after Burdine kicked another deputy. Burdine was stunned a third time, and still showed no effect. Sgt. Myers asked for EMS to be called because he was not going to be accepted at the jail and they held him face down while waiting; he was finally successfully handcuffed. Burdine vomited, causing Deputy Kaiser, holding him, to back off. However, Burdine grabbed one of Kaiser's fingers, almost dislocating it.

The first EMTs[69] present testified that Burdine was breathing and "mumbling something incoherent, but might not have been using actual words." By the time he was moved, however, he had ceased breathing. Officers did CPR but he was pronounced dead upon arrival.

At autopsy, alcohol, methamphetamine and marijuana was found. He also had an heart condition that put him at increased risk for sudden cardiac arrest. The ME concluded the death was accidental, caused by excited delirium. Later, the family's expert put the cause of death as "traumatic asphyxia due to compression of his neck and back" while being restrained and called it a homicide. (He noted that drugs were "within recreational ranges.")

Burdine's estate filed suit. All of the defendant officers were dismissed by summary judgment, with the court finding that their actions were all reasonable under the Fourth Amendment. The Estate appealed.

[69] From other facts, it appeared they may have worked for the jail, as Burdine was transported via backboard in a squad car.

ISSUE: Must a triable issue of fact be shown by more than just an expert's opinion?

HOLDING: Yes

DISCUSSION: The Court agreed that the only evidence of the strangulation was the Estate's own expert, noting that his interpretation required that he find that Burdine was unconscious when first viewed by the EMTs. However, no other evidence supports that, and several witnesses testified that he was conscious, although incoherent, and was breathing. The Court agreed that no one testified that anyone "manually compressed" his throat, and noted that "there is remarkable consistency in their accounts – despite the involvement of two separate police forces, comprising over a half-dozen officers, and an independent two-person EMT squad."

The Court agreed that a "single expert report that relies on the expert's contrary interpretation of all other evidence does not create a genuine issue of material fact."[70]

The court upheld the decision to award summary judgment to the officers.

Martin v. City of Broadview Heights 712 F.3d 951 (6th Cir. 2013)

FACTS: Parker, age 19, died in the early morning hours of August 16, 2007, just minutes after he was arrested and restrained by Officers Tieber, Zimmerman and Semanco (Broadview Heights, OH, PD). They responded to a call about a man, wearing only jeans, yelling for help. On their way there, a nearby resident reported that a "naked male entered a nearby apartment." When Officer Tieber arrived, he encountered Martin "running towards his patrol car, speaking quickly and nonsensically." He calmed down momentarily and asked to be taken to jail but when Tieber tried to handcuff him, he "jogged away." Tieber ran after and fell on top of Martin. Officer Semanco fell on top of both of them and delivered "compliance body shots" to Martin's side with a knee. Martin bit Tieber's knuckle and Tieber struck Martin twice in the face. "Semanco used all of his force to strike Martin's face, back, and ribs at least five times." Tieber folded himself around Martin and there was evidence to suggest he had his arm around Martin's neck. Officer Zimmerman arrived and assisted with handcuffing. Officer Novotney arrived. Martin was held down, although there was dispute as to how much force was used and for how long. Marin made a "gurgling sound." When they rolled him over, he was unresponsive and showed "no signs of life." Help was called but he was declared dead.

Martin's cause of death was disputed. The Coroner ruled he died from excited delirium due to LSD, but the forensic pathologist ruled his death was due to asphyxiation an d that the officers' actions were "compressive events." He and a second pathologists pointed to injuries that suggested he was pulled backwards by the neck.

[70] Lewis v. Adams County, 244 F. App'x 1 (6th Cir. 2007).

Martin's mother (his estate administrator) filed suit under 42 U.S.C. §1983. The officers asserted qualified immunity, which was denied. The officers appealed.

ISSUE: Is tackling a naked subject (by multiple officers) reasonable?

HOLDING: No (in most cases)

DISCUSSION: Looking at the Graham factors, the Court agreed that the officers were justified in "deploying some force" – but the degree would be the issue. With respect to the second factor, the Court had to take into account that they had reason to believe that he was "either on drugs or mentally unstable and they knew he was unarmed." The Court found the Tieber's response, to tackle Martin and fall on top of him, was unreasonable. A police expert testified that he should have tried to de-escalate the situation. Instead, Tieber "used severe force that did not match the threat Martin presented."

With respect to the third factor, Martin did initially jog away from Tieber. But even so, what the officers did was not a "reasonable response to Martin's attempted escape." Further, his movement when he was on the ground, described as an "active struggle" by the officers, suggested that his "movements were an attempt to gasp for air and escape the compressive weight of the officers on top of him, not an effort to fight with the officers or get away."[71] Their actions "were not justified by Martin's possible crime, the threat he posed to anyone's safety, or his resistance." The Court looked to case law and agreed that the line in Champion v. Outlook Nashville Inc. was crossed when they placed weight on him after he was handcuffed.[72] Although the officers argued otherwise, the Court ruled that Champion did not apply to just after the handcuffing, however, but that it "forbids creating asphyxiating conditions by putting substantial pressure" to "restrain a subject who does not pose a material danger to the officers or others."[73] Champion "required the officers to de-escalate the situation and adjust the application of force downward."

The Court agreed that the officers were not entitled to qualified immunity.

Edgerson v. Matatall 2013 WL 3185723 (6th Cir. 2013)

FACTS: On December 19, 2007, Officer Matatall and Sgt. Porter, were on patrol with Southfield (MI) PD. They spotted a vehicle matching a description of a previous incident with police. Matatall attempted to make a traffic stop and a pursuit ensued. He ended the chase by intentionally colliding with the vehicle. Edgerson and Williams fled from the vehicle. Sgt. Porter fired at Williams but he was not hit. Williams was apprehended and a gun found nearby – he admitted he had it during the chase.

[71] Graham v. Connor, 490 U.S. 386 (1989).
[72] 380 F.3d 893 (6th Cir. 2004).
[73] See also Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007).

Edgerson, in the meantime, later stated that as he ran, he slipped and fell and was shot by Officer Matatall five times while he was "down in a surrender position." All five bullets entered in the back of his lower right leg, from the knee down. Officer Matatall claimed that "Edgerson repeatedly looked back and appeared to be aiming a weapon at him." He claimed he shot Edgerson while he was still standing. He only realized after the fact that the object he'd been holding was a cell phone. A witness corroborated that "Edgerson had taken a 'shooting stance,' with 'one arm up, looking parallel.'" (The witness was previously a Marine and his father had been a police officer.) No charges were apparently ever placed against Edgerson.

Edgerson filed suit under 42 U.S.C. §1983. The officers moved for summary judgment but the Court denied it as to Officer Matatall. He appealed.

ISSUE: Must issues be raised in the initial brief supporting a motion to be considered?

HOLDING: Yes

DISCUSSION: The Court looked to the objective reasonable of Matatall's conduct. The Court noted that the only evidence that "Officer Matatall offers is the portion of the testimony of the 'independent' witness that Matatall finds corroborating." It discounts Edgerson's questions about the credibility of that witness, and that type of inquiry is for the jury to decide.

Notably, from the opinion, it appeared that Officer Matatall did not raise the argument that medical records would show that Edgerson was standing when shot until the reply brief – this information must properly be brought in the initial brief supporting the motion. By not doing so, he forfeited it. The Court also noted that it did "not have jurisdiction to consider arguments that rely entirely on a defendant's disputed version of the facts."

The Court upheld the denial of Matatall's motion.

Correa v. Simone, 2013 WL 2500603 (6th Cir. 2013)

FACTS: On May 15, 2010, Officer Simone (Cleveland, OH, PD) was dispatched to a disturbance at a local bar. The suspect was described, and was indicated to have a gun. Simone went to the area and found Correa, who matched the description. He turned on his dash cam but failed to turn on the sound.

The officer stopped Correa at gunpoint and told him to prone out. He went to his knees but would not lie down. Simone tased him. Two additional officers arrived and Correa was searched. He did not have a gun. Eventually, he was charged with the assault at the bar (he spat on a woman), obstruction and disorderly conduct.

Correa stated that when the officer stopped him, he did not know what was going on. He stated that he followed the officers' orders and did what he was told to do, which did

not include lying prone. He filed suit against Officer Simone for excessive force. The District Court, viewing the video, indicated there were questions of fact about whether Correa was complying with the orders or not. The Court allowed some of the claims to go forward, including excessive force under §1983. Simone appealed.

ISSUE: May a Taser be used on someone who is not actively resisting?

HOLDING: No

DISCUSSION: The Court reviewed the situation, looking at three factors, "the severity of the crime at issue," "whether the suspect poses an immediate threat to the safety of the officers or others," and "whether he is actively resisting arrest or attempting to evade arrest by flight."[74] In this case, the Court agreed that the first weighed in Simone's favor and the third in Correa's favor. With respect to the second, the Court agreed that in the past, it had held that when a subject has their hands up, they are not actively resisting.[75]

The Court agreed that "using a taser on a potentially armed suspect who is complying with all officer commands and not resisting violated clearly established law" at the time of the incident.

The Court upheld the denial of summary judgment.

Alford v. Vernier, 2013 WL 1489459 (6th Cir. 2013)

FACTS: Avery called the Oak Park (MI) police to report a possible burglary occurred at the house across the street from his own. The first officer there, Officer Meier, found the identified vehicle in the driveway and the back door open. He saw no sign of forced entry. He entered and found Alford coming upstairs from the basement. He pulled him from the house, at gunpoint, and frisked him. Alford was told to get on the ground. Meier explained why he was there. Alford said he lived there but his ID gave a different address. (In fact, it was his father's home and he'd only recently moved out – he had returned to pick up mail. Alford suggested that Meier call his father to verify and he did so. Alford was allowed to get up but he was not allowed to go inside until other officers arrived. Individually filed reports indicated officers arrived, cleared the scene and left within 20 minutes. The only use of force indicated was that the officers did have their guns drawn upon arrival.

Alford alleged the following in the subsequent lawsuit – characterizing the officers' as barging in, without knocking or announcing, pointing guns at him and yelling at him to come outside. They also searched the premises without consent. Alford did not claim in an early deposition that he'd suffered any physical abuse, nor was he handcuffed,

[74] See Wysong v. City of Heath, 260 F. App'x 848 (6th Cir. 2008).
[75] Thomas v. Plummer, 489 F. App'x 116 (6th Cir. 2012); Landis v. Baker, 297 Fed App'x 453 (6th Cir. 2008).

although it was alleged in the complaint. Alford, Sr., the homeowner also sued, allegedly that his house had been ransacked and that cash was a ring were missing.

The trial court ruled in favor of the officers, in summary judgment, ruling their conduct was permitted under the circumstances. The Alfords appealed.

ISSUE: May an affidavit be submitted that contradicts prior deposition testimony?

HOLDING: No

DISCUSSION: The Court noted that a "party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts [his] earlier deposition testimony."[76] Further, the Court agreed that with respect to the original allegations, sufficient exigency existed to allow the officers' actions in temporarily seizing Alford and for going through the house. The Court agreed that the "scope of the search," under the circumstances, was "arguably excessive," The officers asserted that nothing was removed, and "absent any identification of an individual even arguably responsible for such an action," the Court agreed that summary judgment was proper.

The Court upheld the decision of the lower court in favor of the defendant officers.

Norton v. Stille, 2013 WL 1955889 (6th Cir. 2013)

FACTS; On October 12, 2010, Norton was a 58 year old woman, 5'4, 130 lbs., using a scooter for mobility due to recent foot surgery. Deputy Sheriff Stille was 5'2, 105 lbs. Norton was booked into jail for a minor offense and "unnerved, she began to devolve into a panic attack when placed into custody." At the booking area, she asked for a minute to try to get control of herself. She removed her jewelry when asked to do so. She said she needed to blow her nose and picked up a roll of toilet tissue. Stille took it away from her. Norton then grabbed a paper towel to do so, as well as a plastic soda bottle, stating she needed a drink. Stille grabbed Norton's arm and they struggled. The bottle finally dropped to the floor. (All of this was caught on video, with no audio.) "After the bottle had fallen to the floor, and any conceivable threat to Stille had dissipated, Stille pulled Norton's left arm behind her back, swinging Norton off her scooter, pushing the scooter against the wall and breaking Norton's arm." Norton was unstable due to her injury and ended up face down on the floor. Her arm was broken a second time and Norton passed out. Eventually it was found to have been broken three times and Norton remains permanently disabled.

Norton sued Stille under 42 U.S.C. §1983. Stilled moved for summary judgment under the Heck bar, which was denied.[77] Stille was denied qualified immunity and appealed.

[76] Reid v. Sears, Roebuck, and Co., 790 F.2d 453 (6th Cir. 1986).
[77] See Heck v. Humphrey, 512 U.S. 477 (1994).

ISSUE: Does passive resistance warrant actions that cause serious physical injury?

HOLDING: No

DISCUSSION: The court looked to the Graham[78] factors – "severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether she is actively resisting arrest or attempting to evade arrest by flight—favor a finding of excessive force." The Court noted that the offense was minor, failing to pay a fine for a non-appearance in court – and "never posed ay real threat to Stille." Further, the bottle "was never placed in a position that Stille could have reasonably interpreted as threatening." At best, Norton's resistance was passive. The first break didn't occur until after the bottle was dropped. At best, she "defied" Stille by grabbing for items, but she was not "actively resisting or trying to flee." She was only contained in a secure area, with other officers around, but she was limited in movement by the scooter and boot on one foot. It is hardly plausible that she would be fleeing anywhere quickly.

The Court concluded that the use of force was excessive and that the right to be free of such force was long established.

The Court affirmed the denial of summary judgment based on qualified immunity.

Lyttle v. Redford Police Officer Riley, 2013 WL 1798983 (6th Cir. 2013)

FACTS: On May 19, 2009, shortly after midnight, Redford police were dispatched to the home of Lyttle and his "then-girlfriend, Sarah Thomas." They had received a hang-up 911 that a female was "fighting with her boyfriend." (Thomas had made the call.) When they arrived both were standing in an enclosed front porch. The officers later said they could see Lyttle "pulling Thomas against her will towards the inside of the house from the porch." Lyttle later disputed that, arguing that the blinds were drawn. (Thomas later testified that she was not being forced against her will.) Wanting to talk to her to ensure her safety, the police had Thomas come outside. Thomas told them no one else was inside with Lyttle, but the police apparently tried to force open the front door. Lyttle fled out the back. Officer Riley, at the rear, said that Lyttle "came out the back of the house with his hands in his pockets and ignored Riley's command to remove his hands from his pockets and lay down." Riley tased Lyttle. Lyttle later testified that he was actually trying to unlock the door when it became jammed by the officers kicking it and that he told them that he would come out through the back. He claims he was shirtless and with his hands up when he was tased three times, the last time causing him to fall to the ground and injure his back.

Lyttle was charged with domestic assault and battery, resisting and obstructing police. He was acquitted, and filed suit under 42 U.S.C. §1983 for excessive force, false arrest, false imprisonment and related claims under state law as well against Riley and the

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City. Riley requested summary judgment and qualified immunity; it was denied. Riley appealed.

ISSUE: If material facts are in dispute, is qualified immunity appropriate?

HOLDING: No

DISCUSSION: The Court began its opinion by noting that "the facts of this case are clearly in dispute, and the appeal is frivolous." On each major issue, the Court noted that the parties vastly disputed what had occurred. As such, the Court agreed that immunity was not appropriate and affirmed the dismissal of the appeal.

42 USC §1983 – MEDICAL NEED

Russell v. Davis, 2013 WL 1442518 (6th Cir. 2013)

FACTS: On September 5, 2008, Jason Miller was arrested for shoplifting. He identified himself as his brother Chris. Of course, no one showed up at the court appearance and a warrant was issued for Chris Miller. Chris was able to get that corrected but also told Officer Mick that he believed his brother would commit "suicide by cop." Officer Mick later stated he shared that information with others, including Officer Davis and Sgt. Brophey.

Miller, accompanied by his mother, Russell, tried to turn himself in but was for some reason unable to do so. Trisha (Chris's wife) called Officer Mick and told him where Miller could be found. Officer David and Sgt. Brophey went to the Russell home and found Miller walking on the street. He was arrested.

At that time, Miller was carrying a .357-magnum Ruger revolver, which measured roughly one foot in length and weighed nearly three pounds. Officer Davis claimed he did a thorough search but was not discovered. Miller was handcuffed and placed in Davis's car, and then the two officers searched the jacket he'd been carrying. In the meantime, Miller extracted the firearm and managed, through some contortions, to shoot himself in the mouth, fatally.

Russell filed suit against the officers and the agency under 42 U.S.C. §1983. The officers requested summary judgment, which was granted. Russell appealed.

ISSUE: Must officers take precautions to ensure a subject does not commit suicide?

HOLDING: Yes (if they have reason to know they may do so)

DISCUSSION: Russell argued that "because they had been informed that Miller was likely to commit suicide," the officers "had a duty to take precautions to prevent an in-custody suicide." The Court noted that although the Eighth Amendment does not

apply to pre-trial detainees in custody, the Fourteenth Amendment "does provide them with a right to adequate medical treatment."[79] Under either, the plaintiff must show that there was a "deliberate indifference to serious medical needs."[80] Certainly, the court Agreed, "suicidal tendencies are a sufficiently serious medical need."[81]

With respect to an in-custody suicide, the Court stated, in Barber v. City of Salem:

> The proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section §1983 for a jail detainee's suicide is: whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs.[82]

However, the Court noted, the officers did apprehend him, handcuff him and place him in a police car. They stood immediately outside while searching his jacket, during which brief time he managed to extract the weapon and commit suicide. As such, although their "conduct was far from ideal," performing "at best … a cursory search," the officers did not act with deliberate indifference.

The court upheld the dismissal on the basis that no constitutional violation occurred.

FIRST AMENDMENT

Faith Baptist Church v. Waterford Township, 2013 WL 1489387 (6th Cir. 2013)

FACTS; Faith Baptist Church is an non-denominational church in Waterford, Michigan. Around September 11, 2007, Carlson, a neighbor, complained about loud music at the church to the Waterford PD. He had complained about the church earlier but the church "was unresponsive." On September 27, officers were dispatched but no music was playing at the time so they did not visit the church. On October 7, Carlson again complained, this time the music was so loud the offices could hear it while standing inside the house. They spoke to the pastor, Kerr, who said the band was practicing for a service. Although the officers spoke to him and checked his ID, they did not apparently tell them to turn the music down. On October 10, the police were again summoned. The officers found no music playing but Bedell, the prosecuting attorney, had arrived already and reported he'd found the music excessive, when he arrived, and that the "windows at Carlson's residence were rattling, and Bedell could not use a normal speaking tone. Bedell told Combs, the youth pastor, that he would be getting misdemeanor warrants for the band members. He dropped off copies of a dozen noise complaints. On October 11, he followed up with Pastor Woody and told him that he would continue to issue tickets until the church stopped playing rock music. He also

[79] Gray v. City of Detroit, 399 F.3d 612 (6th Cir. 2005).
[80] Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001).
[81] Horn v. Madison Cnty Fiscal Court, 22 F.3d 653 (6th Cir.)
[82]

sent a letter to band members. The police made a last visit to the church on October 28 and discovered the music had already stopped. They identified the band members and left. No charges were ever filed.

The church, and various members, filed suit against the Waterford PD and other defendants, under 42 U.S.C. §1983, for violations of their First Amendment rights to religion, as well as claims under the Fourth Amendment. Eventually, all of the claims were dismissed and the church appealed.

ISSUE: Is a prosecutor entitled to absolute immunity when engaging in an investigation?

HOLDING: No

DISCUSSION: With respect to the claims against Bedell, the Court agreed that a denial of absolute immunity was proper, as ""[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution are not entitled to absolute immunity."[83]

> When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other.[84]

With respect to a suit against Bedell in his official capacity, the Court agreed that "'Official-capacity suits represent only another way of pleading an action against an entity of which an officer is an agent."[85] Since Waterford Township had been sued as well, a suit against Bedell was superfluous.

The Court also addressed claims against the prosecutor and the officers, under a conspiracy theory, finding "nothing more than 'bare assertions' insufficient to state a plausible claim that Defendants conspired to deprive them of their constitutional rights in violation of 42 U.S.C. §1983." The Court also upheld the dismissal of the church's assertion that they were being singled out for playing rock music and that the enforcement of the disturbing-the-peace ordinance was selective, because they presented no facts upon which to base such an assertion.

However, with respect to the First Amendment, the Court noted that it must "conduct an independent examination of the whole record so as to assure [] that this judgment does not constitute a forbidden intrusion on the field of free expression."[86] The Court looked

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[83] Buckley v. Fitzsimmons, 509 U.S. 259 (1993).
[84] Id. (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).
[85] Everson v. Leis, 556 F.3d 484 (6th Cir. 2009) (quoting Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978)
[86] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) (internal quotation marks and alteration omitted); see also United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth., 163 F.3d 341 (6th Cir. 1998) (recognizing duty to engage in independent examination of the record in First Amendment cases).

to whether the church had standing, noting that the test 1) it has suffered an actual or imminent injury in fact that is concrete and particularized; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury is redressable.[87] Standing is relaxed in First Amendment cases "because of a judicial prediction or assumption that the policy's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[88] In such cases if it can be objectively shown that "an imminent threat that chills protected activity,' that chill alone is a cognizable injury-in-fact."[89] In this case, the credible threat of future prosecution was enough. The court agreed that they had standing to bring claims under the First Amendment. The court ruled that the Fourth Amendment claims were not properly asserted and since the claims were dismissed without prejudice, they could be asserted at a later time.

The Court reversed the dismissal of Bedell in his individual capacity (for injunctive and declaratory relief) and the dismissal of the church members' claims under the First amendment for lack of standing. All other claims were affirmed.

WIRETAP

U.S. v. Williams, 2013 WL 1759941 (6th Cir. 2013)

FACTS: On December 31, 2008, Officer Pride (Cleveland, TN, PD) stopped Williams' car for having a nonfunctional brake light. He tried to flee and was tased. He possessed a bottle with 3.9 grams of crack cocaine. Shortly thereafter, he was identified by an individual, who became an informant, as a drug dealer, and the CI began to make controlled buys from Williams.

On December 23, 2009, Agent Ledford (DEA) prepared the following affidavit for a wiretap order.

> This affidavit is based primarily on my review of materials provided by agents and officers as well as discussions with CPD officers and Sammy McNelley, who has been a Task Force Officer with the DEA in Chattanooga, Tennessee. I have also personally participated in some phases of the investigation, although I was not personally present for the majority of drug purchases and other activity discussed herein. I rely extensively on analysis of reports written by other federal, state, and local law enforcement officers and employees assigned to this case; the review of telephone toll records and pen register data; review of text messages received from the execution of a federal search warrant for such content; and review of debriefings of controlled sources of information and other cooperating witnesses.

[87] Fieger v. Michigan Supreme Court, 553 F.3d 955 (6th Cir. 2009); Fieger v. Ferry, 471 F.3d 637 (6th Cir. 2006).
[88] Berner v. Delahanty, 129 F.3d 20 (1st Cir. 1997) (quoting Broadrick v. Oklahoma, 413 U.S. 601 (1973)).
[89] Grendell v. Ohio Supreme Court, 252 F.3d 828, 832 (6th Cir. 2001).

One source was McNelly, a former agent, who'd been terminated from the drug task force for reasons unrelated to his honesty. Agent Ledford detailed why the wiretap was needed and why "alternative investigative techniques were ineffective." For example, he noted that physical surveillance was difficult because Williams was dealing in areas populated by his friends who could alert him. Subpoenas against potential witnesses would likely cause them to be subject to intimidation, as would less formal interviews. Search warrants required that locations be first identified. The CI could not identify all of the members of the group or the source of the drugs.

Eventually he was indicted and moved for suppression, argued that the affidavit was insufficient to meet the requirements of 18 U.S.C. §2518. He was convicted and appealed.

ISSUE: Does a wiretap order require an indication that other methods are or would likely be unsuccessful?

HOLDING: Yes

DISCUSSION: The court noted that federal law requires that a wiretap order "must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." In U.S. v. Landmesser, the Court had noted that " the "necessity" requirement is designed "to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime" and to prevent wiretapping from being "routinely employed as the initial step in criminal investigation."[90] The Court agreed, however, that the need was evident and proven by the extensive affidavit which carefully detailed what had been done.

The Court also noted that the reliance on the work of Agent McNelly was also proper and that there was no proof that McNelly was dishonest. Agent Ledford documented that the information had come from a fired officer, but also corroborated the information through other independent sources. The court noted that as explained in Alfano," "[t]he basic standards for a wiretap are similar to those for a search warrant, but there also must be strict compliance with Title III."

The Court upheld the warrant and his plea.

U.S. v. Wren, 2013 WL 2477168 (6th Cir. 2013)

FACTS: During an investigation into another individual, Wren was identified as a heroin supplier. During intercepted phone calls, Wren's involvement was confirmed. The DEA executed a search warrant on a home owned by Wren and found considerable evidence and cash, along with a rifle and 100-round drum magazine. A "drug ledger" was also found, along with a pistol and a vehicle registered to a company owned by Wren.

[90] 553 F.2d 17 (6th Cir.1977)

Wren was charged for trafficking and for the gun, as he was a convicted felon. He was convicted and appealed.

ISSUE: Does a wiretap order require an indication that other methods are or would likely be unsuccessful?

HOLDING: Yes

DISCUSSION: Although Wren argued the warrant lacked probable cause, the Court bypassed that inquiry, concluding that the officers "relied in good faith on a facially-valid warrant issued by a 'neutral and detached' magistrate."[91] The court agreed that the facts, as presented in the warrant, were sufficient to support the agents' reliance on it.

With respect to his challenge on the wiretaps, the Court agreed that "a law-enforcement official's application for wiretap authority requires 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.'"[92] This ensures that a wiretap is not used as the initial step in an investigation or when more traditional investigative techniques could suffice.[93] Law enforcement officials must give serious consideration to non-wiretap techniques prior to applying for wiretap authority and explain why, under the particular circumstances, such techniques would be, or are, inadequate.[94] The government is not required to show the impossibility of other means of obtaining information and the mere fact that some investigative techniques produced evidence does not foreclose the need for a wiretap. Wren argued that the language in the affidavit was "simply boilerplate language and mere opinion," the same as applied in most narcotics investigations. The court however, agreed that it properly demonstrated "that the government seriously considered non-wiretap techniques and it explained why such techniques would be inadequate under the circumstances." It provided a "detailed summary of the investigative techniques used prior to seeking the wiretap." The lengthy affidavit included a references to prior investigation efforts and why they would not provide a clear picture of the drug organization. The Court agreed the wiretap was appropriate.

With respect to his constructive possession of the weapons, the Court noted that was sufficient, as "constructive possession exists when a defendant 'knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.'" However, "where the defendant shares possession of the premises where contraband is found, additional incriminating evidence must show the defendant knew of and controlled the contraband."[95] A connection or nexus must

[91] See U.S. v. Leon, 468 U.S. 897 (1984)
[92] 18 U.S.C. § 2518(1)(c).
[93] U.S. v. Rice, 478 F.3d 704 (6th Cir. 2007).
[94] U.S. v. Stewart, 306 F.3d 295 (6th Cir. 2002).
[95] U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009);

still be shown between the weapon and the defendant,. In this case, Wren owned the house and was sleeping there when the warrant was executed. The ammunition was located in an unlocked safe in his bedroom, and a photo of a weapon, with a drum attached, was on his telephone. The pistol was found in a vehicle he apparently owned, or at least drove. The jury apparently discounted testimony from his girlfriend that the weapons were hers.

After resolving other issues, the Court upheld Wren's convictions.

CIVIL LITIGATION

Mott v. Mayer, 2013 WL 1663219 (6th Cir. 2013)

FACTS: In 2005, Mott because a target of a joint operation between the DEA and the Richland County Sheriff's Office (RCSO) to combat drug trafficking (specifically crack cocaine." After his arrest, Mott had admitted having done a small transport of drugs but denied everything else, including involvement in a large scale operation. Mott pled guilty, but it was learned two years later that Bray, the CI, "had engaged in illegal conduct throughout the investigation." Bray, the CI who had identified Mott, later pled guilty to perjury and deprivation of civil rights as a result of his actions. The federal government requested the court to overturn the convictions/pleas of all of the defendants arrested as a result of the operation, noting that "Bray's illegal conduct was so pervasive and his credibility so tainted by his guilty plea" that the defendants were entitled to the dismissals. At that time, the charges against Mott were dismissed.

Mott filed suit against a number of state and federal officials, including Captain Faith, Sgt. Mayer and Det. Metcalf (RCSO).[96] The RCSO officers moved for summary judgment and were denied on the issues of fabrication of evidence and false arrest, but were granted it with respect to the other claims Mott raised. Both cross-appealed their denials.

ISSUE: May the use of an unreliable informant lead to civil liability against the officers?

HOLDING: Yes

DISCUSSION: Mott argued that several events occurred that demonstrated that Bray was not a reliable informant and argued that the officers repeatedly failed to corroborate Bray's statements as well. Examples pointed to by the Court included that Bray, who was on parole, was acting as CI without the consent of his parole officer. Officers expressed concern about a buy, including that they did not know where he went during the transaction, nor did they follow him afterward, "even though they were responsible for monitoring him in order to ensure both the safety of the parties involved and the integrity of the evidence.' In another situation, Bray claimed to have made a

[96] The federal defendants settled with Mott.

controlled buy from a subject who was wearing a GPS monitor, yet the officers never verified the location of the subject – which would have shown that the subject could not have made the sale to Bray. Bray was also caught with crack cocaine himself, a violation of his agreement with the RCSO. Det. Metcalf apparently helped him get the matter dismissed. Bray allegedly made several transactions with "Mott" – only apparently identified by Bray as such. Bray was proven to have lied to the investigators about the money, having hidden $780 of what he was supposed to use for the buy in his car. However, they continued to use Bray as a CI.

With respect to the malicious prosecution claim, the court noted that it was distinct from false arrest, as the first involves the "wrongful institution of legal process." To succeed in a malicious prosecution claim, the following elements must be met:

> First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a §1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.

Mott's grand jury indictment was based entirely on Lucas repeating "unreliable, uncorroborated information from Bray." Some of the testimony was "misleading or false." However, the trial court had ruled that Mott's later statement provided sufficient probable cause to support the continued prosecution. The appellate court, however, noted that "authorities made the decision to charge Mott and the grand jury indicted him before he spoke with investigators." In fact, although he admitted some involvement with drug trafficking, he explicitly denied any involvement in the specific transactions with which he was charged.

The Court reversed the grant of summary judgment to the defendant RCSO officers on the issue of malicious prosecution. The court also affirmed the denial of summary judgment on other claims.